Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

VANESSA LEGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GEORGE MICHAEL DEGEURIN
FOREMAN, DEGEURIN, NUGENT & GERGER
300 Main St.
Houston, Texas 77002
(713) 655-9000

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I.

Did the Court of Appeals err in holding that the petitioner was not protected by the qualified First Amendment privilege enjoyed by journalists?

II.

Was the Court of Appeals' determination that the contemnor had not made an adequate showing to invoke her Fifth Amendment privilege in conflict with the relevant decisions of this Court?

LIST OF ALL PARTIES

1. Vanessa Leggett, Defendant-Petitioner.
2. The United States of America, Plaintiff-Respondent.

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U.S. Supreme Court Rule 12 1

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW the petitioner, Vanessa Leggett, through the undersigned counsel, and pursuant to Rule 12, files this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and in support thereof would show the Court as follows:

LOWER COURT'S OPINION

On August 17, 2001, the Court of Appeals for the Fifth Circuit affirmed, in an unpublished opinion, the District Court's order of July 20, 2001 that held Ms. Leggett in civil contempt. A petition for rehearing *en banc* was denied on November 13, 2001. All of the opinions are appended to this petition.

BASIS FOR JURISDICTION

1. The final opinion of the Court of Appeals for the Fifth Circuit was delivered on November 13, 2001. The three judge panel opinion for the Fifth Circuit was filed on August 17, 2001.

2. Petitioner asks this Court to review the final judgment of the Court of Appeals with respect to questions of law arising under the United States Constitution.

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

4. This petition is timely if filed on or before February 11, 2002.

CONSTITUTIONAL PROVISIONS RELIED UPON

The First Amendment to the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On July 19, 2001 petitioner Vanessa Leggett, a free-lance journalist, was held in civil contempt under 28 U.S.C. § 1826 by a judge of the United States District Court for the Southern District of Texas after Ms. Leggett refused to reveal her confidential source information in response to a grand jury subpoena (Tran. II-46).[1] Ms. Leggett is a reporter and author[2] who has conducted four years of tape-recorded interviews in six states as part of her research for a book on the "Robert Angleton murder case" in Houston, Texas. Mr. Angleton was tried and acquitted of capital murder in a Texas state court in August, 1998. After his acquittal, the U.S. Attorney's office for the Southern District of Texas instituted an investigation of him for federal charges.

The federal prosecutors began their efforts to seek information from Ms. Leggett in July, 2000 (Tran. I-23). Knowing she was writing a book, FBI agents, in November, 2000, tried to recruit Ms. Leggett as a secret investigator by offering her a confidential informant contract,

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[1] The record is designated herein as follows: "Rec. Exc." is the Record Excerpts volume, prepared for the Court of Appeals, containing germane court documents. "Tran. I" and "Tran II" refer to transcripts from district court hearings on July 6, 2001 and July 19, 2001 respectively.

[2] Ms. Leggett has previously received media credentials from *Texas Monthly* and the *Houston Press*. She has also been published in the FBI's book *The Varieties of Homicide and its Research*, in the short story anthology *Suddenly* and by *Newsweek*. Ms. Leggett has also won first place for her writings from the Fort Bend Writers Guild and the Santa Barbara Writers Conference.

which included oral promises of financial gain, but also required her to notify the FBI before disseminating or publishing her book or any of her materials. She declined their proposal. She believed that working for the government as a secret informant would impair her ability to research and write as an independent investigative reporter, and she did not want the government restricting the dissemination of her book (Tran. I-26-27). Immediately upon receiving her refusal, the FBI agents served Ms. Leggett with a grand jury subpoena, requiring her appearance a month later. Ms. Leggett complied with that subpoena, relying on the FBI's promise that she would not be asked to reveal her confidential source information (Tran. I-24-25).[3] That promise was honored on December 7, 2000, when she testified (Tran. I-24).

In June, 2001, the government served Ms. Leggett with a new grand jury subpoena that compelled production and surrender of the following items:

> "**Any and all** tape recorded conversations, **originals and copies**, of conversations you had with the following individuals, [34 people listed] or any other recorded conversations with individuals associated with the prosecution of ROBERT ANGLETON, either with or without their consent, **and all transcripts** prepared from those tape recordings:" [Emphasis added.]

Ms. Leggett filed a motion to quash the subpoena. On July 6, 2001, the District Court denied the motion. The

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[3] Ms. Leggett testified during the Motion to Quash that a number of her sources demanded confidentiality (in some instances in writing) because they were afraid of retaliation by Angleton.

judge ruled that there is *no* qualified privilege for journalists to protect either confidential or nonconfidential sources in criminal cases in the Fifth Circuit, citing *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998), as well as this Court's seminal decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Ms. Leggett filed a *pro se* Motion to Reconsider on July 16, 2001. In that motion, Ms. Leggett pointed out that a demand for her to turn over all originals and copies of recordings, as well as transcripts of those recordings, would deprive her of the resources she needed to continue her journalistic work. The government never filed a response to this motion.

An identical subpoena was again served on Ms. Leggett on July 18, 2001, directing her to appear before the grand jury the next morning. On the present record, it is not clear why the prosecutors did not show a compliance with their own internal Department of Justice procedures which is required to precede issuance of a subpoena to a journalist.[4] Ms. Leggett appeared as directed, but she invoked the journalist's qualified privilege under U.S. CONST. amend. I and the privilege against self-incrimination under U.S. CONST. amend. V. In recognition of Ms. Leggett's Fifth Amendment claim of privilege, the Assistant U.S. Attorney produced an "informal letter" for use immunity[5] (Tran. II-3).

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[4] Under 28 C.F.R. § 50.10, the Justice Department is to conduct an in-house review, balancing its investigative needs with the journalist's interests, and then obtain the approval of the U.S. Attorney General before obtaining the subpoena.

[5] Ms. Leggett had testified during the Motion to Quash hearing that she had tape recorded some interviewees without their knowledge. (Tran. I-28 and 34). The prosecution later

The district judge ordered Ms. Leggett to comply with a particular line of questioning about recordings. When Ms. Leggett continued to invoke her constitutional privileges, the district court held Ms. Leggett in contempt (Tran. II-50-54). In the course of the hearing, the judge did not receive evidence or articulate findings with respect to any balancing of the interests involved in the First Amendment question. The district court also did not enter findings as to whether the informal offer of partial use immunity was sufficient to protect the Fifth Amendment privilege.[6] The district court went on to deny Ms. Leggett's previously filed *pro se* Motion to Reconsider without argument (Tran. II-10). The court ordered Ms. Leggett to be incarcerated the next day (Tran. II-54, 63). At the time of this filing, Ms. Leggett has been held in custody for over 160 days, which is more than three times as long as any other reporter in United States history.[7]

An expedited appeal was ordered, but Ms. Leggett's motions for stay or bond pending appeal were denied both by the District Court and the Court of Appeals. On

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acknowledged in the contempt hearing that there are at least "5-6 states" in which non-consensual recordings might result in criminal charges. (Tran. II-35). Similarly, the mere possession of surreptitious interception devices may be a violation of federal law under 18 U.S.C. § 2512.

[6] The prosecutor acknowledged that his informal immunity letter was not the same as statutory immunity pursuant to 18 U.S.C. §§ 6001, *et seq.*, but mistakenly thought the difference was that the letter did not offer transactional immunity.

[7] The Reporter's Committee for a Free Press has compiled a list of known contempt sanctions against American journalists and publishes them on their web site: www.rcfp.org.

August 17th, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the District Court's order. *See* Appendix. Ms. Leggett timely sought *en banc* reconsideration, which was denied on November 13, 2001.

REASONS FOR REVIEW

I.

Did the Court of Appeals err in holding that the petitioner was not protected by the qualified First Amendment privilege for journalists?

For almost thirty years, lower courts have struggled to interpret and apply the First Amendment qualified privilege articulated by this Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The result has been an unequal implementation of the privilege across the United States with news gatherers receiving disparate treatment depending on which Court of Appeals they appear before. The issue has become one of national importance and the time is ripe for this Court to provide clarification.

In *Branzburg*, this Court recognized that journalists enjoy some degree of constitutional privilege against disclosure of confidential source information. 408 U.S. at 709. Although this Court found in *Branzburg* that the governmental interest in a grand jury's investigative function outweighed the privilege on the facts of those cases,[8] this Court's recognition of the underlying privilege has remained the case's most important aspect. An

[8] *Branzburg* involved three consolidated cases.

amicus brief submitted by interested journalistic organizations to the Court of Appeals collated almost three dozen state and federal cases recognizing some degree of privilege in the wake of *Branzburg*.[9] Yet as the *amici* journalistic organizations observed in their brief, "it cannot be said that a consensus has been reached."

A widely accepted interpretation of *Branzburg*, based in part on Justice Powell's concurring opinion, is that the qualified privilege for news gatherers under the First Amendment means there is a balancing test that should be conducted on a case-by-case basis. Justice Powell's concurring opinion in *Branzburg* stated:

> The asserted claim of privilege [by a journalist] should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant

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[9] The *amicus* brief was filed by The Reporter's Committee for Freedom of the Press, The American Society of Newspaper Editors, The Radio-Television News Directors Association, and The Society of Professional Journalists. The following organizations also moved to join the *amicus* brief but their motion, which was untimely, was denied: ABC, Inc., The American Society of Journalists and Authors, The Associated Press, Belo Corp., Cable News Network LP, California First Amendment Coalition, CBS News, The Copley Press, Dow Jones & Company, Inc., The Freedom of Information Foundation of Texas, Investigative Reporters and Editors, Inc.. Louisiana Press Association, Mississippi Center for Freedom of Information, Mississippi Press Association, National Broadcasting Company, Inc., National Writers Union, The New York Times Company, Student Press Law Center, Texas Association of Broadcasters, Texas Daily Newspaper Association, Washington Independent Writers, Washington Independent Writers Legal and Education Fund and The Washington Post Company.

> testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

408 U.S. at 710 (Powell, J., concurring).

The Fifth Circuit has impeded application of such a case-by-case balancing test, as is illustrated by the decision in *United States v. Smith,* 135 F.3d 963 (5th Cir. 1998) and now by the decision in the present case, by finding that there is no qualified privilege afforded to journalists in criminal cases. Relying primarily on *Smith,* the Court of Appeals held in this cause that the journalist's privilege is "ineffectual against a grand jury subpoena absent evidence of governmental harassment or oppression." Slip opin., p. 6. The Court affirmed the lower court's failure to conduct any balancing of the interests and its application of a more narrow "intentional harassment" standard to Ms. Leggett's claim of privilege. The Fifth Circuit's interpretation of *Branzburg* diminishes the importance of the qualified First Amendment privilege to no more than a weakened version of a procedural rule (i.e., Fed. R. Crim. P. 17(c)[10]) and ignores *Branzburg's* edict that newspersons enjoy an actual form of constitutional privilege. This Court should grant a writ in this case in order to clarify these issues.

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[10] Fed. R. Crim. P. 17(c) states in relevant part: "The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

A.

Do journalists have a qualified First Amendment privilege in criminal cases that require a court to conduct a balancing of interests on a case-by-case basis?

In the shadow of *Branzburg*, federal circuit courts have generally recognized a "qualified privilege" for journalists to resist disclosure of sources' identities and source materials. Courts have repeatedly acknowledged the chilling effect and resulting self-censorship that discovery of a journalist's unpublished information can have on the gathering and reporting of news. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("Society's interest in protecting the integrity of the news gathering process, and in insuring the free flow of information to the public is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.' " (internal cites ommitted)). What the courts are ultimately protecting, when acknowledging a journalist's qualified privilege, is the public's "right to know".

The First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth and D.C. Circuits have all interpreted *Branzburg* as establishing that a qualified privilege exists under the First Amendment for at least some unpublished information.[11] Moreover, eight federal circuits have held that the

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[11] *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *Bruno & Sullivan, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2nd Cir. 1982), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *LaRouche v. National Broadcasting Co.*, 780 F.2d

qualified privilege applies to journalists faced with a subpoena seeking discovery of confidential sources or, where the subpoenaing party has not met its burden, for unpublished information.[12]

This Court has stated that news gathering activities are entitled to protection under the First Amendment because without it, "[the] freedom of the press could be eviscerated." *Branzburg*, 408 U.S. at 681. Justice Powell's concurrence in *Branzburg* arguably provides the lower courts with the means of protecting that concern – by conducting a balancing of the countervailing interests on a case-by-case basis. What remains in question amongst the circuits is to what degree should the balancing of interests occur based on the "type" of case before the court.

For example, in the Fifth Circuit, the Court acknowledges an expansive balancing of interests test when faced with a journalist's qualified First Amendment privilege in certain civil cases. In those cases, it uses a three prong test to weigh whether discovery of the requested information is appropriate by assessing if:

1134 (4th Cir. 1986); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

[12] *See Clyburn v. New World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990); *United States v. LaRouche Campaign, supra; LaRouche v. National Broadcasting Co., supra; United States v. Burke, supra; United States v. Cuthbertson, supra; Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir.), *modified on rehearing*, 628 F.2d 932 (1980); *Shoen v. Shoen, supra; Silkwood v. Kerr-McGee Corp, supra.*

1) the information is relevant;

2) the information can be obtained by alternative means; and

3) if there is a compelling interest in the information.

Miller v. Transamerican Press, Inc., supra at 726. Nevertheless, the Fifth Circuit refuses to broaden its application of its three part balancing test to criminal cases, while other circuits do not. As will be demonstrated in more detail below, there is a great division amongst the circuits as to how the news gatherer's qualified First Amendment privilege is applied in criminal cases; thus, favoring the grant of certiorari. Sup. Ct. R. 10.

B.

Has the Court of Appeals in the Fifth Circuit entered a decision regarding application of a journalist's qualified First Amendment Privilege that is in conflict with the decisions of other United States Court of Appeals on the same matter?[13]

The circuits are in dispute whether the First Amendment necessitates a qualified privilege in criminal cases.

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[13] Although this case deals with a subpoena in a grand jury setting, it is very likely that Ms. Leggett will be resubpoenaed for the same information in the actual criminal trial. The Fifth Circuit's test applying only harassment or oppression remains the same in both instances and its conflict with other circuits does not change. If the grand jury ends with Ms. Leggett remaining steadfast in her assertion of her privileges, this court is nonetheless urged to accept this writ, in order to prevent these issues, which are very capable of repetition, from escaping review in this case.

A circuit-by-circuit analysis is provided below to exemplify the apparent conflict.

DISTRICT OF COLUMBIA CIRCUIT

The Court of Appeals has held, citing *Branzburg*, that a "good faith" criminal investigation overrides a journalist's interest in protecting sources in all criminal settings including a grand jury, although the court suggests a different standard might apply to a "bad faith" investigation. *Reporter's Committee for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). – *But see United States v. Hubbard*, 493 F.Supp. 202 (D.D.C. 1979) (Reporters protected under First Amendment and *Branzburg* from a subpoena in a criminal case, unless showing made that information is necessary for a fair hearing and not available from other sources); *In re Grand Jury 95-1*, 27 Med. L.Rptr. 1833 (D.D.C. Dec. 27, 1996) (Media has no First Amendment privilege under *Branzburg* to withhold documents sought by grand jury, and even if privilege were to apply, it has been overcome by a showing that materials are relevant, alternative sources had been exhausted and compliance with 18 C.F.R. § 50.10 – the Department of Justice's internal regulations regarding subpoenaing news gatherers).

FIRST CIRCUIT

The Court of Appeals has held that when a newsman asserts a qualified First Amendment privilege in response to a defendant's subpoena for non-confidential materials

in a criminal case, the lower court must conduct a balancing of the applicable constitutional interests. *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988). The lower court shall weigh a defendant's right to a fair trial – that is, a right to compulsory process and confrontation of adverse witnesses – against the First Amendment concerns of the news media as part of its *in camera* inspection of the subpoenaed materials. *Id.* The lower court is expected to limit the disclosure of journalistic products to those cases where their use would be of significant utility to a criminal defendant. *Id.* at 1183.

SECOND CIRCUIT

The Court of Appeals has held that the standard of review for a journalist's qualified First Amendment privilege should remain the same in both civil and criminal cases. *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983). The Court applied a three part test in *Burke*, a criminal case, in order to balance the competing constitutional interests on a case-by-case basis. *Id.* The Court ordered that a journalist's subpoenaed materials could be disclosed only where there has been a clear and specific showing that the material sought is: 1) highly material and relevant; 2) necessary or critical to the maintenance of the claim by the party; and 3) not obtainable from other available sources. *Id.* Such a balancing of interests under the First Amendment should even occur where a reporter is asked to testify before a grand jury. *Baker v. F & F Investment*, 470 F.2d 778, 784-85 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (citing *Branzburg*). Yet, when a reporter is an actual witness to the crime itself, such as was the case in *Branzburg*, First

Amendment concerns are outweighed by a subpoenaing defendant's need for the information. *United States v. Cutler,* 6 F.3d 67 (2d Cir. 1993) (Limiting *Burke* to its facts, the court lowered the level of "need" that must be shown to overcome the privilege when the materials at issue were sought by a criminal defendant). *See also Gonzales v. National Broadcasting Co.,* 194 F.3d 29 (2d Cir. 1999).

THIRD CIRCUIT

The Court of Appeals has found that a newsperson's First Amendment qualified privilege applies in criminal cases and protects a journalist from divulging confidential information and unpublished materials. *United States v. Cuthbertson,* 630 F.2d 139, 146-147 (3d Cir. 1980) ("Cuthbertson I"), *cert. denied,* 449 U.S. 1126 (1981). The lower court must balance a subpoenaing defendant's need for the information against the interests underlying the First Amendment privilege in order to determine whether the newsman's privilege will yield in a particular case. *Id.* at 148. The lower court should not require the disclosure of a journalist's information for an *in camera* review unless it is first shown that a defendant's subpoena complies with Fed. R. Crim. P. 17(c) and he is unable to acquire the information from another source that does not enjoy such a privilege. *Id. See also United States v. Cuthbertson,* 651 F.2d 189 (3d Cir.), *cert. denied,* 454 U.S. 1056 (1981) ("Cuthbertson II").

When no countervailing constitutional concerns are at stake, a journalist's First Amendment privilege is absolute; when constitutional prece[illegible]s collide, the privilege

becomes qualified and a balancing process comes into play to determine its limits. *United States v. Criden,* 633 F.2d 346, 356 (3d Cir. 1980). Before a reporter can be compelled to disclose a confidential source in a criminal case, the movant must demonstrate that he has made an effort to obtain the information from other sources, must demonstrate that the only access to the information sought is through the journalist and the journalist's sources and must persuade the court that the information sought is crucial to the claim. *Id.* In grand jury situations, the government must over come a three part test by demonstrating: 1) it has attempted to obtain the information from other sources, 2) the only access to the information sought is through the journalist and his/her sources, and 3) the information sought is crucial to the cause at issue. *In re Williams,* 766 F.Supp. 358 (W.D. Pa. 1991), *aff'd by equally divided court,* 963 F.2d 567 (3d Cir. 1992) (*en banc*).

FOURTH CIRCUIT

The Court of Appeals, citing *Branzburg* and emphasizing the nonconfidentiality of the information sought, held that absent evidence of government harassment or bad faith, reporters have no privilege under the First Amendment that is different from any other citizen that would allow them not to testify about knowledge relevant to a criminal prosecution. *In re Shain,* 978 F.2d 850 (4th Cir. 1992).

FIFTH CIRCUIT

The Court of Appeals has held, under *Branzburg*, that there is no qualified journalist's First Amendment privilege and no balancing of the interests under the First Amendment in regards to subpoenaed confidential and nonconfidential information in criminal cases. *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998); *In re Grand Jury Subpoenas (Leggett)*, Slip. opin. 01-20745 (Nov. 13, 2001). The Court will only protect a reporter from government harassment or oppression. *Id.* In Ms. Leggett's case, the Court upheld the lower court's more narrow application of an "intentional harassment" standard to Ms. Leggett's claim of privilege.

SIXTH CIRCUIT

The Court of Appeals has held, citing *Branzburg* and rejecting any effect resulting from Justice Powell's opinion, that newsmen have no greater rights under the First Amendment than any other witnesses when appearing before a grand jury. The Court also determined that the proper test to be applied is whether a reporter is being harassed to disrupt his relationship with his confidential source, whether the information bears more than a remote and tenuous relationship to the subject of the investigation, and whether the forced disclosure of the confidential source relationship will serve a legitimate law enforcement need. *Storer Communications, Inc. v. Giovan*, 810 F.2d 580 (6th Cir. 1987).

SEVENTH CIRCUIT

The Court of Appeals has not squarely addressed a journalist's qualified First Amendment privilege in criminal cases, but in 1996, it found that a lower court had not abused its discretion when it quashed, under the First Amendment and an Illinois shield law, a criminal defendant's subpoena requesting a reporter's confidential information. *United States v. Lloyd*, 71 F.3d 1256 (7th Cir. 1995), *cert. denied*, 517 U.S. 1250 (1996). In making its finding, the Court recognized that the substance of the information sought by the defendant was merely speculative and was only going to be offered for impeachment purposes. *Id.*

EIGHTH CIRCUIT

The Court of Appeals has not squarely addressed whether journalist's enjoy a qualified First Amendment privilege in criminal cases, although it footnoted to *Branzburg* in a civil libel case for the proposition that a newsman does not possess a First Amendment privilege to refuse to answer relevant and material questions asked during a good-faith grand jury investigation. *Cervantes v. Time, Inc.*, 464 F.2d 986, 992, n. 9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

NINTH CIRCUIT

The Court of Appeal's first case after the *Branzburg* decision upheld a journalist's claim of a qualified First Amendment privilege where a grand jury investigation failed to establish a "substantial connection" between the

information sought and the conduct being investigated. *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972). The Court later held that a balancing of conflicting interests was appropriate in a non-grand jury criminal case where a reporter's First Amendment qualified privilege was being weighed against a defendant's guarantee of due process in an on-going trial. *Farr v. Pitchess*, 522 F.2d 464, 466-69 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). The Court in subsequent cases has also held that where a grand jury's requests for information from a reporter were posed in good faith and with a legitimate need for law enforcement purposes – a journalist has no First Amendment qualified privilege. *In re Lewis*, 501 F.2d 418 (9th Cir. 1974) ("Lewis I"), *cert. denied*, 420 U.S. 913 (1975) and *In re Lewis*, 517 F.2d 236 (9th Cir. 1975) ("Lewis II"). In both *Lewis* cases, the court also noted that the Justice Department had complied with its own regulations regarding subpoenas to the media. *See also In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994) (Ph.D. student's claim of a "scholar's privilege", as akin to a journalist's First Amendment qualified privilege, was not applicable before a federal grand jury as invoking Justice Powell's balancing test, where the individual had not argued that the grand jury's inquiry was not conducted in good faith, did not involve a legitimate need of law enforcement, or had only a remote and tenuous relationship to the subject of the investigation).

TENTH CIRCUIT

The Court of Appeals has not yet addressed a reporter's qualified First Amendment privilege in criminal cases.

ELEVENTH CIRCUIT

The Court of Appeals has held that in a criminal case, the standard governing a reporter's First Amendment privilege applies only to information obtained while news gathering and may only be compelled if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case and unavailable from other sources. *United States v. Caporale,* 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied,* 483 U.S. 1021 (1987). The privilege applies equally to both confidential and nonconfidential information. *United States v. Blanton,* 534 F.Supp. 295 (S.D.Fla. 1982), *aff'd,* 730 F.2d 1425 (11th Cir. 1984).

In Sum

The division among the circuits is no more clear than what occurred in Ms. Leggett's case. Here, the Court of Appeals recognized the conflict amongst the circuits (and its own disparate application of the privilege in civil and criminal cases) but choose to take "a narrow view" of the privilege in the criminal sector. Thus in the Fifth Circuit there is no inertia to the government utilizing the press as its investigative arm. It may do so at the whim of the local assistant U.S. Attorney without a requirement that

the public's First Amendment right to a free and independent press be considered. Citizens in other areas of our country enjoy a more protected First Amendment freedom. The diverging views within the individual Court of Appeals has undoubtedly given underlying district courts and state courts little guidance in their own application of the privilege. Whether the privilege should be "broad", such as in the Second or Third Circuits, or whether it should be replaced by the limited criteria imposed by the Fifth Circuit is a key question[14] that should be addressed and given clarification by this Court.

C.

Is *Branzburg* limited merely to protecting against harassment and oppression of newsmen without a balancing of the interests?

While *Smith* stated that "Justice Powell had in mind the 'harassment of newsmen' ", no doubt Justice Powell, and every other justice of this Court, would condemn outright harassment of the press. But by limiting the analysis of *Branzburg* to only the harassment or oppression of the individual newsman himself – the court is drawn away from the ultimate right that requires protection – the public's right to know.

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[14] Although *Branzburg* was cited as authority in *Smith*, no petition for writ of certiorari was filed in *Smith*, and it remains to be seen whether *Smith* applied *Branzburg* correctly.

Clearly, this Court in *Branzburg* recognized that the First Amendment guarantees protection to news gatherers beyond those of a procedural nature, as was evidenced when this Court stated: "[t]he Court does not hold that newsmen, subpoenaed to testify before the grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." 408 U.S. at 709. Yet, to accept the Fifth Circuit's narrow view of the privilege in Ms. Leggett's case (intentional harassment) would provide fewer rights to a journalist than those already provided to all subpoenaed criminal witnesses under Federal Rule of Criminal Procedure 17(c), which protects against unreasonable or oppressive subpoenas.[15] It is the balancing test – asserted through a newsperson's claim of qualified constitutional privilege – that serves to protect the public's First Amendment right to be informed.

No where is the need for a balancing test more apparent than when the government issues a subpoena that compels "**any and all . . . originals and copies**" of four years of a journalist's investigative research, as is the case here. The Court of Appeals erred by affirming a test that condones a subpoena that allows the government to seize far more information than is necessary for the grand jury to execute its investigatory function. Limiting a reporter's First Amendment protections to that of "intentional government harassment" does not prevent the government from confiscating *all* copies of Ms. Leggett's journalistic

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[15] Ms. Leggett continues to also assert that the subpoena should have been quashed under Fed. R. Crim. P. 17(c).

interviews, without any justification, and thereby effectively preventing Ms. Leggett from writing her book and substantiating her accounts to a publisher.[16] What the Fifth Circuit's test fails to protect against is the government's unfettered power to implement a "prior restraint" on Ms. Leggett's ability to publish which consequently restricts the public's right to know.

This Court in *Branzburg* specifically did not address the issue of "prior restraint" and the *Branzburg* majority found it important to point out that the cases under its consideration did not involve that as an element:

> But these cases involve no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold.

408 U.S. at 681. Yet this issue is arguably one of the most important components of the First Amendment analysis when dealing with news gatherers. This Court has stated that preventing prior restraint of the press "was a leading purpose in the adoption of the constitutional provision." *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 451-452 (1938).

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[16] The government's earlier attempt to control the dissemination of her book by contract failed when Ms. Leggett rejected the confidential informant contract. Seizing, by grand jury subpoena, all of her interviews, both originals and copies, would of course delay the writing of her book. And surely, her incarceration for resisting the subpoena has stopped the book from being disseminated to the public altogether, "[a]n inmate currently confined in an institution may not be employed or act as a reporter or publish under byline." Department of Justice – Federal Bureau of Prisons, P.S.1480.05 § 540.60(3)(d).

By virtue of taking away a journalist's records, the government may make it impossible for a journalist to function, as is the situation in the present case. Yet, under *Smith* and the test approved in this case, a journalist has no recourse against such an action in a criminal setting.

Here, the Court of Appeals upheld the validity of the subpoena, finding that the record does not indicate that Ms. Leggett has been harassed, that the materials requested were related to the subject matter of the grand jury and:

> "While perhaps not as narrowly tailored as would be ideal, the subpoena directing Leggett to produce her tape recordings and interview notes is not so overly broad as to be oppressive" (Slip opin., p. 7).

The Court never addresses the issue of prior restraint because it does not fit into its narrow analysis under the First Amendment and Federal Rule of Criminal Procedure 17(c). Surely Ms. Leggett's "right to publish without prior governmental approval" is a given and therefore, should have been part of a proper balancing analysis by the district court. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Indeed, this Court in *Branzburg, supra* at 709, expressly stated that it did not want to convert the press into an investigative arm of the government, which is exactly what Ms. Leggett would become if the government, and not Ms. Leggett or a publisher, is given exclusive possession and control of Ms. Leggett's work product. Ironically, it was only after Ms. Leggett refused

to become a confidential informant for the government, due in part to the government's requested restriction on the dissemination and publication of her materials, that she faced the total loss of her entire research through the government's subpoena power. There is no reason why Ms. Leggett should have been denied copies of her own work. At the very least, a proper balancing test would have prevented complete confiscation. Since this Court did not have occasion in *Branzburg* to deal with a subpoena which had a "prior restraint" effect, let alone one with an effect amounting to confiscation, it is important that this Court grant the writ of certiorari and consider this aspect of the issue.

Finally, only a balancing test, without a threshold requirement that "intentional harassment" or "oppression" be shown, adequately protects the public interest. A newsperson's claim of qualified constitutional privilege ultimately serves to protect the public's First Amendment right to be informed by an independent press. Conducting such a "case by case" review would not burden the system because as this court recognized in *Branzburg*, "the bulk of disagreements and controversies between press and federal officials" will be handled internally by the U.S. Attorney General through the Department of Justice's own regulations regarding subpoenas to the press. 408 U.S. at 7070; *see* 28 C.F.R. § 50.10.[17] However it

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[17] The regulations mandate federal prosecutors to seek the express approval of the U.S. Attorney General prior to subpoenaing a journalist's information and in doing so, following a specific series guidelines that will allow them to "strike the proper balance" between the public's right to know and the public's interest in effective law enforcement when

is in those extreme cases, such as here, where the Government has failed to conduct an internal balancing test or where the subpoena has resulted in an improper prior restraint that the balancing of interests is most necessary. Under the Fifth Circuit's limited test of "intentional harassment" or oppression, these issues cannot be addressed or evaluated. For the foregoing reasons, this Court is urged to accept review of Ms. Leggett's case and provide clarification as to the proper test to be applied to a news gatherer's First Amendment qualified privilege.

II.

Was the Court of Appeals determination that the contemnor had not made an adequate showing to invoke her Fifth Amendment privilege in conflict with the relevant decisions of this Court?

Under the Fifth Amendment, a witness may resist not only testimony but also the production of personal documents that may be incriminating. That privilege has long been construed as applying within the grand jury room. *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *United States v. Mandujano*, 425 U.S. 564, 570-573 (1976). As further explained in *Mandujano*, immunity grants play an important role in determining the applicability of the Fifth Amendment to grand jury witnesses. Ms. Leggett

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compelling a journalist's information. 28 C.F.R. § 50.10. Indeed, this Court in *Branzburg, supra* at 707, noted the importance of the Department of Justice's internal review and many of the circuit courts have used this factor as part of their balancing tests. No such analysis was done in this case because the interests were not balanced by the lower courts.

asserted her Fifth Amendment privilege before the grand jury based on a reasonable fear of self-incrimination, or in other words, a good faith basis, thereby requiring the government to secure immunity under 18 U.S.C. §§ 6001, *et seq.*

The Fifth Amendment protects against production of tapes or notes, when the act of production is testimonial. *Fisher v. United States*, 425 U.S. 391, 408 (1976) As the Fifth Circuit itself recognized:

> [T]he testimonial component involved with order for production of documents "is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. . . . A defendant is protected from producing his documents in response to a subpoena duces tecum, for his production of them in court would be his voucher of their genuineness. There would then be testimonial compulsion.

In re Grand Jury Subpoena (Kent), 646 F.2d 963, 968 (5th Cir. 1981). *See also United States v. Doe*, 465 U.S. 605, 612-13 (1984) (the act of production of papers which are covered by the Fifth Amendment establishes that the papers exist, are in the witness' possession or control, and are authentic.)

The Court of Appeals made short work of Ms. Leggett's Fifth Amendment claim, first observing that Ms. Leggett was "repeatedly advised that she is neither a target nor a subject of the grand jury investigation." Slip opin., p. 8. The Court of Appeals went on to hold that Ms. Leggett had not met the requirement of "reasonable cause to apprehend danger from a direct answer" to questions

and had not shown that her answers might "furnish a link in the chain of evidence needed for a prosecution," citing *United States v. Whittington*, 786 F.2d 644, 645-646 (5th Cir. 1986). Finally, the Court of Appeals accepted the government's proffer of a non-prosecution agreement as an adequate alternative safeguard. The problems with the Court's ruling regarding Ms. Leggett's claim of Fifth Amendment privilege will be discussed in turn below.

First, the Court of Appeals analysis failed to recognize that a witness need not confess guilt to any crime, or even be guilty of any crime, to properly invoke the Fifth Amendment. *Ohio v. Reiner*, 532 U.S. 17, 121 S.Ct. 1252 (2001). The privilege is not limited to those who may be the "target" or the "subject" of a grand jury investigation. As this Court recently reaffirmed:

> One of the Fifth Amendment's basic functions . . . is to protect innocent men . . . "who otherwise might be ensnared by ambiguous circumstances." *Grunewald v. United States*, 353 U.S. 391 (1957).

Reiner, supra, at 1254.

The Court of Appeals decision also did not recognize that Ms. Leggett had made a sufficient showing that she had "reasonable cause" to apprehend danger of prosecution and that her assertion of the Fifth Amendment privilege was well justified. Here, the Government's subpoena requested all taped interviews conducted by Ms. Leggett "either with or without consent". Ms. Leggett testified at the Motion to Quash hearing that in the course of her research (conducted throughout the United States), she had taped interviews that fit both categories (Tran. I-28

and 34). The government recognized this was potentially illegal activity in about "five or six" states (Tran. II-35). Similarly, the mere possession of surreptitious interception devices may also be a violation of federal law under 18 U.S.C. § 2512. Ms. Leggett provided more than enough information to assert that she had "reasonable cause" to believe that she was in danger of prosecution. However by asserting her Fifth Amendment privilege, she refused to provide the "missing link" that could lead to an indictment.

Finally, the Court of Appeals erred by accepting the government's inadequate offer of immunity as the equivalent of the Fifth Amendment's protection. It upheld the District Court's erroneous conclusion that the prosecutor's offer of a unilateral letter of "immunity" was equivalent to Section 6001, *et seq.* Immunity can be granted only (1) by following the requirements of Section 6001 *et seq.* or (2) by a mutually agreed letter or contract between the government and the witness, and not by a rejected offer of an "immunity letter." The validity of a letter agreement is determined by contract law – arms length bargaining, a meeting of the minds on the essential terms of the agreement and acceptance without coercion. Here the government said either you agree to the terms of the letter or we will ask the court to jail you for criminal contempt.

An important difference between statutory/formal immunity and informal immunity is that the latter is not binding upon the States. This follows from the fact that the local prosecutor representing the State is normally not a party to the agreement between the witness and the federal prosecutor, and this, cannot be contractually

bound by the federal prosecutor's agreements.[18] This distinction is especially important in this case where the government recognized that Ms. Leggett may need additional state immunity for nonconsensual recordings of conversations outside the state of Texas. Yet, the government refused to seek statutory or state prosecution immunity, unless Ms. Leggett gave incriminating details supporting her asserted privilege. Ms. Leggett was not properly immunized and for this reason alone, this court should grant further review of this case and vacate Ms. Leggett's finding of contempt.

CONCLUSION

Wherefore the petitioner prays that this Court grant the writ of certiorari as to the questions presented in order to mandate uniform application of the qualified privilege of journalist's under the First Amendment and to order recognition of petitioner's absolute Fifth Amendment privilege.

Respectfully submitted,

George Michael DeGeurin
Foreman, DeGeurin & Nugent
300 Main St.
Houston, Texas 77002
(713) 655-9000
Counsel of Record for Petitioner

[18] Similarly, it was doubtful that the informal immunity letter would be binding on a federal prosecutor outside the jurisdiction of the Southern District of Texas upon review for possible prosecution under 18 U.S.C. § 2512.

APPENDIX

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2. District Court's Contempt Order, July 20, 2001.....App. 10
3. Order Denying En Banc Consideration, November 13, 2001 .....App. 11

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20745

IN RE: GRAND JURY SUBPOENAS

**Appeal from the United States District Court
for the Southern District of Texas
(H-01-MC-179)**

(Filed Aug. 17, 2001)

Before JOLLY, JONES and EMILIO M. GARZA, Circuit Judges,

PER CURIAM:*[1]

Vanessa Leggett appeals the district court's order finding her in contempt of court for refusing to comply with a grand jury subpoena. *See* 28 U.S.C. § 1826(a). Citing her "journalist's privilege"[2] under the First Amendment Leggett refused to provide the grand jury with certain audio tapes and notes. Because this circuit has held that the journalist's privilege is both limited and qualified, and is especially hedged about in grand jury

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[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4

[2] This constitutional protection is also frequently referred to as the "news reporter's privilege."

proceedings, we now affirm the district court's order finding Leggett in contempt.

A federal grand jury for the Southern District of Texas is currently conducting an investigation into possible illegal activities of Robert Angleton. Angleton, a wealthy Houstonian, is under investigation for, inter alia, a murder-for-hire scheme in which he allegedly agreed to pay his brother, Roger Angleton, to kill his wife, Doris Angleton. Robert Angleton was previously tried and acquitted in state court for his role in the 1997 murder. The federal grand jury was convened after the acquittal. Roger Angleton, the alleged triggerman, committed suicide while in custody at the Harris County jail. This notorious "society murder" and the bizarre events surrounding it have garnered a great deal of attention in Houston and throughout Texas.

Vanessa Leggett is an English teacher and aspiring freelance writer[3] who became intrigued by the Angleton case from its inception. In order to write a book about the murder, she began an extensive independent investigation that led to interviews with both Angleton brothers, Roger's wife Jennifer Manning, and numerous other people connected to the case. The interviews were recorded on tapes and in written notes.

Because of her knowledge of the case, Leggett was subpoenaed to appear before the federal grand jury on

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[3] Leggett's body of published work consists of a single article in an FBI publication, *Varieties of Homicide*, and one fictional short story. To date, Leggett has published nothing on the Angleton murder.

December 7, 2000. She was advised of the nature of the grand jury's investigation and was assured that she was neither a target nor a subject of the grand jury proceedings. Leggett testified before the grand jury without protest and answered all of the questions posed to her. She did not object at that time to turning over to the grand jury all notes or tapes or photographs that would help them.

After the grand jury appearance, Leggett resumed her independent investigation. On June 18, 2001, she received another subpoena directing her to appear before the grand jury, and to bring with her

> Any and all tape recorded conversations, originals and copies, of conversations you had with any of the following individuals [identifying 34 people by name], or any other recorded conversations with individuals associated with the prosecution of ROBERT ANGLETON, either with or without their consent, and all transcripts prepared from those tape recordings.

In response, Leggett hired an attorney and moved to quash the subpoena, invoking the journalist's privilege under the First Amendment. Following a hearing on July 6, the district court denied Leggett's motion in a written order. While her pro se motion to reconsider remained pending, she was served on July 18 with a new but virtually identical grand jury subpoena compelling her to appear on July 19. That night Leggett retained her current counsel.

Leggett went before the grand jury, but, armed with claims of First and Fifth Amendment privilege, she refused to produce the tape recordings and notes. The

United States countered her invocation of the privilege against self-incrimination with a "proffer letter" granting use and derivative-use immunity for any testimony given before the grand jury or in statements made to federal agents. Leggett refused to accept this offer.

The government obtained an immediate hearing before the district court to address Leggett's non-compliance. The district court held her in civil contempt pursuant to 28 U.S.C. § 1826(a) and ordered her jailed. The statute authorizes incarceration until Leggett furnishes the materials called for by the subpoena or, if she does not, until the term of the grand jury expires, up to a maximum of 18 months. This expedited appeal followed.

A district court's order holding a recalcitrant witness in contempt under 28 U.S.C. § 1826(a) is reviewed for abuse of discretion. *See In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 n.1 (5th Cir. 1991); *In re Grand Jury Proceedings (Mallory)*, 797 F.2d 906, 907 (10th Cir. 1986). Similarly, an order denying a motion to quash a subpoena is reviewed for abuse of discretion. *See In re Grand Jury Proceedings*, 115 F.3d 1240, 1243 (5th Cir. 1997).

Generally applicable laws, including the obligation to answer a grand jury subpoena, "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* Further, the Supreme Court has admonished that evidentiary privileges – including by logical extension the journalist's privilege – are generally disfavored in the law. *See Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635 (1979).

Nevertheless, a qualified privilege protects journalists from divulging confidential sources under limited circumstances. *See Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1972); *Miller v. Transamerica Press*, 621 F.2d 721, 726 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983). The strength of this journalist's privilege is at its apex in the context of civil cases where the disclosure of confidential sources is at issue. *See Miller*, 621 F.2d at 726; *Selcraig*, 705 F.2d at 789. However, the privilege is far weaker in criminal cases, reaching its nadir in grand jury proceedings: "[n]either does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation even though the reporter might be required to reveal a confidential source." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Branzburg*, 408 U.S. 665).

Even assuming that Leggett, a virtually unpublished freelance writer operating without an employer or a contract for publication, qualifies as a journalist under the law,[4] the journalist's privilege is ineffectual against a

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[4] Because the First Amendment news reporter's privilege is inapplicable in this case whether or not Leggett is a journalist, we do not reach this issue. While this circuit has yet to consider who qualifies as a journalist for the purpose of asserting privilege, our inquiry into this question would be guided by the three part test used in other circuits, which asks whether the person claiming the privilege (1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public. *See In re Madden*, 151 F.3d 125, 128 (3rd Cir. 1998). *See also von Bulow v. von Bulow*, 811 F.2d 136, 142 (2nd Cir. 1987); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). Thus the

grand jury subpoena absent evidence of governmental harassment or oppression. As this court has explicitly held, "[s]hort of such [governmental] harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen." *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998). This court takes a narrow view of the journalist's privilege in criminal cases, particularly in grand jury proceedings. *Smith*, 135 F.3d at 969. Only when the "grand jury investigation is not being conducted in good faith" is the journalist's privilege valid. *Id.* (citing *Branzburg*, 408 U.S. at 710).

In the present case, Leggett has not demonstrated that the district court abused its discretion by finding that the Angleton grand jury investigation is proceeding in good faith. The record does not indicate that Leggett has been harassed or oppressed by these grand jury proceedings. While perhaps not as narrowly tailored as would be ideal, the subpoena directing Leggett to produce her tape recordings and interview notes is not so overly broad as to be oppressive. Indeed, the subpoena clearly seeks material that is closely related to the subject of the grand jury investigation. *See United States v. R. Enterprises, Inc.*, 498 U.S. 292, 111 S.Ct. 722 (1991) (motion to quash grand jury subpoena may not be granted unless the movant demonstrates no reasonable possibility that the materials sought will produce information relevant to the general

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journalist's privilege is available to persons "whose purposes are those traditionally inherent to the press; persons gathering news for publication." *Madden*, 151 F.3d at 129-30. The party claiming the privilege has the burden to establish his or her right to protection. *Id.*; *von Bulow*, 811 F.2d at 144. The district court made no factual finding on Leggett's status as a journalist.

subject of the grand jury's investigation). Contrary to Leggett's insinuations, the record does not reflect that the grand jury is acting with any sort of malice toward her. Leggett's efforts to invoke the qualified journalist's privilege with conclusory assertions fail.

Leggett's reliance on this court's decisions in *Miller*, 621 F.2d at 726, and *Selcraig*, 705 F.2d at 789, is also misguided. Both cases deal with the journalist's privilege in civil libel suits. Their test that balances the civil litigants' need for disclosure against the journalist's legitimate desire to protect confidential sources is entirely inapplicable in criminal cases in this court.[5] In contrast, the Supreme Court has emphasized that in criminal cases – especially grand jury proceedings – the public's interest in effective law enforcement virtually always outweighs the press's privilege against disclosing confidential sources or information. *See Branzburg*, 408 U.S. at 690; *Smith*, 135 F.3d at 972. Further, no circuit court has recognized a qualified testimonial privilege in the context of a criminal grand jury, and other courts have drawn a distinction between grand jury and non-grand jury cases. *See, e.g., In re: Grand Jury Proceedings*, 5 F.3d 397, 402 (9th Cir. 1993) (noting that the court had earlier established a qualified privilege in a non-grand jury context "only because that case – unlike *Branzburg* or the present case – did not involve testimony before a grand jury.").

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[5] In a *civil* case in which the journalist's privilege is invoked, the party seeking to obtain the confidential information must show that: (1) the information is relevant; (2) it cannot be obtained by another means; and (3) there is a compelling interest in the information. *See Miller*, 621 F.2d at 726.

Equally unavailing is Leggett's attempt to invoke the Fifth Amendment privilege against self-incrimination. She has been repeatedly advised that she is neither a target nor a subject of the grand jury investigation. She has made no meaningful argument that the disclosure of her tape recordings and interview notes could be used against her in some future criminal prosecution. Leggett's vague and speculative effort to invoke the Fifth Amendment is further undermined by the government's proffer of a written non-prosecution agreement.[6] Because Leggett has not shown any "reasonable cause to apprehend danger from a direct answer," and because her answers would not "furnish a link in the chain of evidence needed for a prosecution" of her, she cannot properly invoke the Fifth Amendment's privilege against self-incrimination. *United States v. Whittington*, 786 F.2d 644, 645-646 (5th Cir. 1986).

For the foregoing reasons, the district court did not abuse its discretion in ordering Leggett incarcerated for

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[6] The written non-prosecution agreement read as follows:

> Any information you provide in response to questions posed by law enforcement agents or a subsequent grand jury shall receive protections coextensive with and limited by those conferred for testimony given pursuant to a compulsion order issued under the provisions of 18 U.S.C. § 6001 et seq. That is, such information shall not be used directly or indirectly against you in any criminal case, except that such information may be used against you in any prosecution for perjury, giving a false statement to a federal official in a matter within the official's jurisdiction, and/or obstruction of justice.

contempt under 28 U.S.C. § 1826(a). We therefore AFFIRM its judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

MISCELLANEOUS NO. 01-179

JUDGMENT AND COMMITMENT FOR CONTEMPT

(Filed July 20, 2001)

FILED UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20745

In Re: Grand Jury Subpoenas

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed Nov. 12, 2001)

O R D E R:

IT IS ORDERED that sealed appellant's motion for leave to file out of time motion for reconsideration of this Court's order of September 18, 2001, denying bond pending petition for rehearing en banc is DENIED.

IT IS FURTHER ORDERED that the motion for leave to file brief of amicus in support of sealed appellant's motion for reconsideration is DENIED.

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20745

In Re: Grand Jury Subpoenas

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Nov. 13, 2001)

(Opinion 08/17/01, 5. Cir., ___, ___ F.3d ___)

Before JOLLY, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service

not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge
REHG-5a

FILED
JUN 23 2002
CLERK

No. 01-983

IN THE

Supreme Court of the United States

VANESSA LEGGETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RENEE L. GIACHINO *
THE CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington St., Suite 402
Alexandria, VA 22314
(703) 535-5836

DOUGLAS E. LEE
Of Counsel
EHRMANN GEHLBACH BADGER & LEE
215 E. First St.
Dixon, IL 61021
(815) 288-4949

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom is a nonpartisan, non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free speech rights, property rights, privacy rights, freedom of association,

[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

and religious freedoms. Of particular importance to the Center in this case is the need to establish judicial clarity to protect the free flow of information to the public through constitutional protections for news gathering.

SUMMARY OF ARGUMENT

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court recognized that clearly articulated First Amendment protections often are necessary to secure the public's right to know. In *Sullivan*, the threat to the First Amendment was government officials' use of the common law of defamation to inhibit robust and wide-open public debate. The Court neutralized that threat by adopting the actual malice standard, which significantly limits the ability of public officials to abuse defamation actions. In doing so, the Court's message was unmistakable: When existing law fails to adequately safeguard the free flow of information, it must give way to a higher standard.

This case highlights a similar threat to the public's right to know and demonstrates the need for the Court to clearly articulate the limits of the government's power to interfere in news gathering. Author Vanessa Leggett recently spent 168 days in jail for refusing to disclose confidential sources and other unpublished material to a grand jury that was so far afield that even the prosecutor could not explain why some of the information had been demanded. Equally alarming was the fact that Ms. Leggett received her first subpoena immediately after she refused the government's offer to become a paid confidential informant. The Court of Appeals for the Fifth Circuit, however, rejected the qualified news gatherer's privilege asserted by Ms. Leggett, even though that privilege was recognized by this Court in

Branzburg v. Hayes, 408 U.S. 665 (1972), and since has been adopted by a majority of the Courts of Appeal that have considered the issue.[2]

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[2] The issue in this case is not whether a book author, like Ms. Leggett, can assert a privilege more often claimed by news reporters. The Fifth Circuit, while holding the privilege did not apply in criminal cases, assumed authors and freelance writers could assert the privilege in other cases. *In re Grand Jury Subpoenas*, No. 01-20745, slip op. at 5 (5th Cir. Aug. 17, 2001), which is included in the Appendix to the Petition for Writ of Certiorari. To be eligible to claim the privilege, the Fifth Circuit said, a writer must show she "(1) is engaged in investigative reporting; (2) is gathering the news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public." *Id.* at 5, n.4. The Second Circuit, recognizing that "'[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion,'" has held the privilege applies to all investigative writers. *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir.) (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)), *cert. denied*, 481 U.S. 1015 (1987). In reaching the same conclusion, the Ninth Circuit cited the books of Lincoln Steffens, Upton Sinclair, Rachel Carson, Ralph Nader, and Jessica Mitford. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). A more recent example is Mark Fuhrman, the police detective-turned-author whose book, *Murder in Greenwich: Who Killed Martha Moxley?*, contributed to the arrest and pending trial of a suspect accused of murdering a 15-year-old girl in 1975. As the court said in *Shoen*, "What makes journalism journalism is not its format but its content." *Id.*

In *Branzburg*, the members of this Court unanimously agreed that news gathering is entitled to First Amendment protection. While a majority of the Court held the facts of the cases at issue did not support the four reporters' refusal to testify (two had witnessed crimes and two had refused to even appear before grand juries), the Court fractured over how much protection news gatherers generally should receive. The legacy of *Branzburg* thus has become the qualified privilege described in Justice Powell's concurrence, which bridges the majority and dissenting opinions. A court may compel a news gatherer's testimony, Justice Powell wrote, only after striking, on a case-by-case basis, a "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

Unfortunately, not all courts have recognized this legacy. As a result, news gatherers throughout the country are subject to the whim of aggressive prosecutors and unaccountable grand juries. This attack on the free flow of information requires the Court, as it did in *Sullivan*, to establish a definitive threshold of protection. In doing so, however, the Court need not create a new standard. Rather, it need only approve the qualified privilege already recognized by many federal courts, which provides that news gatherers can be required to testify if (1) the information sought is highly material and relevant, (2) a compelling need exists for the information, and (3) the information cannot be obtained by other means. Only by clearly establishing such a threshold can the Court ensure that the public's right to know is not jeopardized by governmental attempts to improperly interfere in news gathering.

ARGUMENT

I. THE FIFTH CIRCUIT'S REFUSAL TO RECOGNIZE THE QUALIFIED NEWS GATHERER'S PRIVILEGE IS INCONSISTENT WITH THIS COURT'S RECOGNITION OF THE PRIVILEGE IN *BRANZBURG* AND CONFLICTS WITH HOLDINGS OF OTHER COURTS OF APPEAL.

A. This Court in *Branzburg* Recognized a Qualified News Gatherer's Privilege.

This Court should review the Fifth Circuit's rejection of the qualified news gatherer's privilege in criminal cases because that rejection is inconsistent with this Court's recognition of the privilege in *Branzburg* and conflicts with holdings of other Courts of Appeal. In *Branzburg*, the Court heard three consolidated cases to determine whether requiring news reporters to testify before grand juries violated the First Amendment. *Id.* at 667. Five of the Justices – Powell, Douglas, Stewart, Brennan, and Marshall – recognized a news gathering privilege. Justice Douglas interpreted the First Amendment most strongly, declaring that reporters possessed an absolute privilege against revealing confidential information. *Id.* at 712 (Douglas, J., dissenting). Justices Stewart, Brennan, and Marshall did not recognize an absolute privilege but said the First Amendment entitled news gatherers to protect confidential information unless the government could

> (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

Id. at 743 (Stewart, Brennan, and Marshall, JJ., dissenting)

(footnotes omitted). Justice Powell also recognized a qualified news gatherer's privilege, emphasizing that the majority's decision to require the reporters in *Branzburg* to testify did not deprive news gatherers of First Amendment protection:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court . . . . In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

Id. at 710 (Powell, J., concurring).

The language in Justice White's opinion rejecting a news gathering privilege was supported by Chief Justice Burger and Justices Blackmun and Rehnquist and cannot be construed as part of a majority opinion. Even these Justices, however, recognized that "news gathering is not without First Amendment protections" and that reporters must be protected if grand juries attempt to improperly disrupt relationships between reporters and sources. *Id.* at 707-08. While the opinions in *Branzburg* have been fodder for much interpretation, it is indisputable that a majority of the Court recognized at least a qualified news gatherer's privilege.

B. The Fifth Circuit's Decision Conflicts with Holdings of Other Courts of Appeal.

As detailed in the Petition for Writ of Certiorari, the Courts of Appeal do not agree about the existence or extent of

the news gatherer's qualified privilege. *See* Petition for Writ of Certiorari, filed herein, at 12-21. The majority of federal appellate courts that have considered the issue has interpreted *Branzburg* to establish a qualified privilege in at least some circumstances.[3] A minority of the courts, however, including the Fifth Circuit, refuses to recognize a qualified privilege for news gatherers in criminal cases.[4]

The majority and minority views stem from conflicting interpretations of *Branzburg* and cannot be reconciled. In adopting the majority view, for example, the Ninth Circuit stated, "It is clear that *Branzburg* recognizes some First Amendment protection of news sources. The

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[3] *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (qualified privilege protects disclosure of unpublished information in criminal cases); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir.) (same), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (qualified privilege protects confidential sources and unpublished information in criminal cases), *cert. denied*, 449 U.S. 1126 (1981); *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975) (qualified privilege protects confidential sources in criminal cases), *cert. denied*, 427 U.S. 912 (1976); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (qualified privilege protects unpublished information in criminal cases), *cert. denied*, 483 U.S. 1021 (1987).

[4] *See, e.g., Reporters Committee for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1049-50 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); *In re Shain*, 978 F.2d 850, 853-54 (4th Cir. 1992); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 584-85 (6th Cir. 1987).

language of the case likewise indicates that the privilege is a limited or conditional one." *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). In adopting the minority view, however, the Sixth Circuit also cited *Branzburg*, holding that Justice Powell's concurring opinion "certainly does not warrant the rewriting of the majority opinion to grant a first amendment testimonial privilege to news reporters . . . ." *Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 585 (6th Cir. 1987). This clear conflict among the circuits, especially considering the importance of the constitutional issue involved, warrants this Court's review. *See* U.S. Sup. Ct. R. 10(a), 10(c).

II. THIS COURT SHOULD CLEARLY ARTICULATE THE QUALIFIED NEWS GATHERER'S PRIVILEGE BECAUSE THE FREE FLOW OF INFORMATION IS VITAL TO THE PUBLIC'S RIGHT TO KNOW.

A. The Qualified News Gatherer's Privilege Protects the Free Flow of Information to the Public.

The Court's clear articulation of the qualified news gatherer's privilege is necessary to ensure the free flow of information to the public and "to protect the important interests of reporters and the public in preserving the confidentiality of journalist's sources." *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982). The qualified news gathering privilege is rooted in the First Amendment and based "on the strong public policy supporting the unfettered communication to the public of information and opinion . . . ." *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). Compelling a news gatherer to disclose confidential sources "unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis . . . ." *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972). "The deterrent effect such disclosure

is likely to have upon future 'undercover' investigative reporting . . . threatens freedom of the press and the public's need to be informed . . . [and] undermines values which traditionally have been protected by federal courts applying federal public policy." *Id.*

This deterrent effect is not limited to instances in which news gatherers are compelled to disclose confidential sources. Requiring an author or reporter to produce other unpublished information also "can constitute a significant intrusion into the newsgathering and editorial processes." *Cuthbertson*, 630 F.2d at 147. "Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege." *Id.* As the First Circuit has observed,

> . . . a lurking and subtle threat to journalists and their employers [exists] if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled. To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment. In addition, frequency of subpoenas would not only preempt the otherwise productive time of journalists and other employees but measurably increase expenditures for legal fees.

United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988).

The test used by the Fifth Circuit in rejecting the privilege – grand jury testimony will be compelled "absent evidence of governmental harassment or oppression"[5] – ignores these threats to the public's right to know. Indeed, the Fifth Circuit's test offers news gatherers no more protection than that afforded all other grand jury witnesses. *See* Fed. R. Crim. P. 17(c) ("The court . . . may quash or modify the subpoena if compliance would be unreasonable or oppressive."). As the courts in the majority have recognized, only a qualified news gatherer's privilege sufficiently safeguards the free flow of information to the public.

B. To Adequately Protect the Public's Right to Know, the Qualified News Gatherer's Privilege Must Be Clearly Articulated by This Court.

The Fifth Circuit's decision in this case and the current conflict among the circuits demonstrate the need for this Court to clearly articulate the qualified news gatherer's privilege. As the law presently exists, reporters are subject to different and contradictory standards depending upon where they gather and publish news. These different standards are especially troubling in an era in which many reporters work on a national stage, whether for coast-to-coast television, books, or the Internet. Does a news gatherer working in the First Circuit, for example, lose her qualified privilege when she travels to Texas to interview a source? Can a Texas grand jury break the seal of a confidential reporter-source relationship created in the First Circuit? Is an e-mail privileged if it is sent from a confidential source in Texas to a reporter in the First Circuit? If sent from a source in the First

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[5] *In re Grand Jury Subpoenas*, slip op. at 6.

Circuit to a reporter in Texas? These and scores of equally disturbing questions demonstrate the need for a clear national standard.[6]

Almost 40 years ago, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court faced a similar challenge. Defamation actions brought by governmental officials endangered the free flow of information to the public, as the liability faced by the media under the common law encouraged self-censorship and chilled criticism. *Id.* at 279. The Court responded boldly, holding that a common law that jeopardized robust and wide-open debate could not survive First Amendment scrutiny. *Id.* The Court accordingly jettisoned the common law rules of liability and damages and replaced them with the actual malice standard, a standard the Court created to ensure the free flow of information to the public. *Id.* at 279-80.

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[6] In a related context, Congress has established a national standard protecting news gatherers from searches and seizures made by federal, state, and local governmental officials during criminal investigations and prosecutions. *See* 42 U.S.C. § 2000aa *et seq.* This legislation, which expressly includes book authors among those protected, provides in part that unpublished materials created by a news gatherer can be searched or seized only if the news gatherer is committing a crime or if a seizure is necessary to prevent death or serious injury. *Id.* at § 2000aa(a). Significantly, the law further provides that officials cannot search or seize unpublished materials collected by a news gatherer merely because the materials have been subpoenaed. Rather, search or seizure of these materials is permitted only after a final court order has been entered compelling compliance with the subpoena. *Id.* at § 2000aa(b).

The conflict among the circuits over the qualified news gatherer's privilege requires a similar response. Like the common law of defamation, this conflict encourages self-censorship and threatens robust and wide-open debate. This threat is unfortunately even more real today, as our country's war footing inevitably will escalate the tension between the government's desire for secrecy and the public's need to know. The Court should take this opportunity to finally and clearly articulate the qualified news gatherer's privilege necessary to protect the free flow of information.

III. THE QUALIFIED NEWS GATHERER'S PRIVILEGE ARTICULATED IN THE COURTS OF APPEAL APPROPRIATELY BALANCES THE PUBLIC'S RIGHT TO KNOW AND THE DUTY OF ALL CITIZENS TO TESTIFY.

Unlike *Sullivan*, this case does not require the Court to create a new standard to protect the First Amendment freedoms at stake. The Courts of Appeal, recognizing the qualified news gatherer's privilege, already have spent considerable time crafting a test that appropriately balances the public's right to know and the needs of the criminal and civil justice systems. Guided by the opinions of Justices Powell and Stewart in *Branzburg*, these courts have held that a news gatherer can be required to testify if (1) the information sought is highly material and relevant, (2) a compelling need exists for the information, and (3) the information cannot be obtained by other means. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983). This test, as applied to confidential and other unpublished information, fairly balances the competing interests involved and ensures that no interest is unjustly sacrificed to another. By adopting and clearly articulating this test, the Court would sufficiently safeguard the free flow of information to the public.

Ms. Leggett's case demonstrates why the Court should take this opportunity to clearly articulate the qualified news gatherer's privilege. While Justice Powell was confident that the decision in *Branzburg* would protect news gatherers from being annexed as investigative arms of government, *see Branzburg*, 408 U.S. at 709 (Powell, J., concurring), Ms. Leggett did not enjoy such protection. After conducting four years of tape-recorded interviews in six states for her book on the murder of socialite Doris Angleton, Ms. Leggett was rewarded with a visit from FBI agents. Aware of her interviews, the agents tried to recruit Ms. Leggett to join the investigative team as a paid confidential informant. When she refused, she was immediately served with her first grand jury subpoena.[7]

After providing non-confidential information to the grand jury in December 2000, Ms. Leggett was subpoenaed again six months later, this time to surrender all of her original tape recordings, all copies of those recordings, and all transcripts prepared from those recordings. Even though she resisted this overly broad subpoena, the Justice Department failed to offer any evidence that it complied with 28 C.F.R. § 50.10, which requires the Department to, among other things, obtain the approval of the U.S. Attorney General before subpoenaing a reporter. The prosecutor admitted at Ms. Leggett's contempt hearing that the subpoena was "unspecific" and that he could not explain why some of the information had been demanded. Nevertheless, the government was not required to justify the subpoena in any

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[7] The facts set forth herein are summarized from those contained in the Petition for Writ of Certiorari and in the Petition for Rehearing En Banc filed in the Fifth Circuit.

way, and Ms. Leggett was found in contempt.[8] Unwilling to break her promises of confidentiality, Ms. Leggett spent the next 168 days in jail, not being released until the grand jury expired.[9]

The issues presented in this case are of the highest constitutional significance. As this Court observed more than 70 years ago, the free flow of information to the public is necessary to sustain a vigorous democracy: "The maintenance of the opportunity for free political discussion to the end

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[8] During the contempt proceedings, the district court judge was candid about her lack of experience in this area of the law, saying at one point that, "[b]eing unfamiliar with this process, having never done this before and needing to rely upon the experience of all the attorneys here . . . ." On appeal, the Fifth Circuit did not review the district court's decision with the scrutiny normally applied in cases affecting First Amendment freedoms. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (court has duty to independently examine record when First Amendment rights are at stake). Instead, it considered only whether the district court judge abused her discretion. *In re Grand Jury Subpoenas*, slip op. at 4.

[9] Although the grand jury that subpoenaed Ms. Leggett has expired, the prosecutor has not ruled out subpoenaing Ms. Leggett again when a new grand jury is impaneled. *Freed writer plans to stand her ground; Government may pursue case with a new grand jury*, Dallas Morning News, Jan. 5, 2002, at 27A (2d ed.). Even if Ms. Leggett is not subpoenaed again, the conflict among the circuits regarding the news gatherer's privilege almost ensures the issues in this case will be raised again. Because these issues are capable of repetition, the Court should grant the Petition for Writ of Certiorari to prevent them from escaping review in this case.

that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Our ability to govern ourselves is threatened every time a party, prosecutor, or grand jury merely fishing for information compels a news gatherer to reveal a confidential source or other unpublished information. A clearly articulated, universally applied, qualified news gatherer's privilege is the strongest shield against this threat. The Court should take the opportunity presented by this case to definitively recognize such a privilege and thus ensure the public's right to know.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Renee L. Giachino *
The Center for Individual Freedom
901 N. Washington St., Suite 402
Alexandria, VA 22314
(703) 535-5836

Douglas E. Lee
Of Counsel
Ehrmann Gehlbach Badger & Lee
215 E. First St.
Dixon, IL 61021
(815) 288-4949

* Counsel of Record *Counsel for Amicus Curiae*

Dated: January 25, 2002.

Supreme Court, U.S.
FILED
MAR 8 2002
CLERK

No. 01-983

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BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, NATIONAL WRITERS UNION and THE ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES L. BABCOCK
ROBERT P. LATHAM
JOHN K. EDWARDS
JACKSON WALKER LLP
1100 Louisiana Street
Suite 4200
Houston, Texas 77002
(713) 752-4200
Counsel for Amici Curiae.

(additional counsel for *Amici* listed on inside cover)

Washington, D.C. • THIEL PRESS • (202) 328-3288

22pp

LUCY A. DALGLISH
GREGG R. LESLIE
DANIEL R. BISCHOF
1815 N. Fort Myer Drive
Suite 900
Arlington, Virginia 22209
Attorneys for
The Reporters Committee for Freedom of the Press

SALLIE RANDOLPH
RANDOLPH LAW OFFICES LLP
1109 Delaware Avenue
Buffalo, New York 14209
Attorneys for
The American Society of Journalists and Authors

JONATHAN TASINI
National Writers Union (UAW 1981)
113 University Place
6th Floor
New York, New York 10003
President of
National Writers Union

RICHARD A. KARPEL
Association of Alternative Newsweeklies
1020 - 16th Street, N.W.
4th Floor
Washington, D.C. 20036-5702
Executive Director
Association of Alternative Newsweeklies

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No. 01-983

IN THE

SUPREME COURT OF THE UNITED STATES

VANESSA LEGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press ("Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests. Since its founding in 1970, the Reporters Committee has provided representation, information, legal

[1] This brief is filed with the written consent of Petitioner and Respondent. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than the *amici* represented herein, its members, or counsel, make a monetary contribution to the preparation or submission of this brief.

guidance, and research in press freedom cases, including cases involving the qualified journalist's privilege against compelled disclosure of unpublished material, and particularly material related to confidential sources.

Founded in 1948, the American Society of Journalists and Authors ("ASJA") is the oldest freelance writers' association in the United States. The Society's over 1000 members are independent, nonfiction writers of books and journalism who have met ASJA's exacting standards of professional achievement.

National Writers Union ("NWU") is the only labor union to represent freelance writers in US markets. The union currently has more than 7000 members.

The Association of Alternative Newsweeklies ("AAN") is a not-for-profit trade association for 121 alternative newspapers in North America. Member publications have a total weekly circulation of more than 7 million and a reach of 20 million readers.

The Reporters Committee, ASJA, NWU, and AAN (collectively, "Amici") adopt the arguments contained in Vanessa Leggett's Petition for Writ of Certiorari to this Court. Amici write separately to emphasize the constitutional considerations and public policy rationales supporting recognition of a First Amendment qualified privilege afforded members of the press against compelled disclosure of confidential sources and material in both civil and criminal proceedings.

SUMMARY OF ARGUMENT

This brief is directed to the protections afforded journalists and members of the press under the First Amendment to the U.S. Constitution to resist compelled production of confidential source information and mater-

ial in response to a federal grand jury subpoena. This Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) provided the foundation for nearly three decades of lower court decisions recognizing this protection, either in the form of an explicit qualified privilege or otherwise, in both civil and criminal proceedings. However, there is now conflict among the federal circuit courts over the existence, nature, and scope of constitutional protection against compelled disclosure of confidential sources and information.

It is the public's "right to know" that is at the center of this important debate over First Amendment protections. Both constitutional and strong public policy rationales support such protections, which exist to promote the free flow of information to the public and not the personal interest of individual journalists or the press in general.

ARGUMENT

I.

THE U.S. CONSTITUTION REQUIRES PROTECTION AGAINST THE COMPELLED DISCLOSURE OF CONFIDENTIAL NEWSGATHERING SOURCES AND MATERIALS IN RESPONSE TO A GRAND JURY SUBPOENA

This case concerns an important matter of public interest, namely the ability of members of the press to protect confidential sources. By clarifying the existence and parameters of this protection, this Court will ensure that journalists nationwide receive the uniform support necessary to carry out their constitutionally protected newsgathering and reporting activities. Absent this protection, the press will be subject to varying levels of treatment depending on the jurisdiction in which they work – in some jurisdictions, including the Fifth Circuit, journalists

will be reduced to an investigative arm of prosecutors, police, criminal defendants, and civil litigants, resulting in a severe chilling of the flow of information to the public.

This Court recognized the constitutional dimension of this public interest in *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), stating that the newsgathering and editorial processes are entitled to protection under the First Amendment: "Without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 U.S. at 681. While this Court rejected an absolute privilege in holding that the reporters in *Branzburg* could be compelled to reveal sources to a grand jury on the facts presented, this Court also stated that "news gathering is not without its First Amendment protections . . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg*, 408 U.S. at 707-08. Justice Powell, in a pivotal concurring opinion, made clear that the majority was not rejecting a qualified privilege:

> The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. [. . .] Indeed, *if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement,* he will have access to the Court on a motion to quash and an appropriate protective order may be issued. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citi-

zens to give relevant testimony with respect to criminal conduct.[2]

Whether the First Amendment's protections of newsgathering activity rise to the level of a qualified privilege, and whether such a privilege is properly attributable to *Branzburg*, has been the subject of much debate. Lower federal courts have struggled to reconcile *Branzburg*'s rejection of an absolute privilege with its enunciation of constitutional protections afforded the press. There is now recognition in a majority of federal circuits that journalists possess a First Amendment qualified privilege against compelled disclosure of their newsgathering activities under *Branzburg*,[3] while a minority of circuits have either declined to recognize the privilege or have so weakened it that it has become virtually nonexistent.[4] Whether characterized as a privilege or as some other form of constitutional protection, a three-part test has emerged to assess the legitimacy of a government sub-

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[2] *Id.* at 709-10 (Powell, J., concurring) (emphasis added).

[3] *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (qualified privilege protects disclosure of unpublished information in criminal cases); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir.) (same), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (qualified privilege protects confidential sources and unpublished information in criminal cases), *cert. denied*, 449 U.S. 1126 (1981); *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975) (qualified privilege protects confidential sources in criminal cases), *cert. denied*, 427 U.S. 912 (1976); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (qualified privilege protects unpublished information in criminal cases), *cert. denied*, 483 U.S. 1021 (1987).

[4] *See, e.g., Reporters Committee for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1049-50 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); *In re Shain*, 978 F.2d 850, 853-54 (4th Cir. 1992); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 584-85 (6th Cir. 1987).

poena seeking confidential source information or material. The government must show that the information sought is (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim or defense; and (3) not obtainable from other sources. *See Branzburg*, 408 U.S. at 725; *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir.), *modified on rehearing*, 628 F.2d 932 (5th Cir. 1980); *see also United States v. Burke*, 700 F.2d 70, 77 (2nd Cir.), *cert. denied*, 464 U.S. 816 (1983).

Courts that have relied upon Justice Powell's balancing test, instead of rigidly rejecting the existence of any constitutional protection, continue to emphasize the policy consequences of denying protection. As the Third Circuit held in *United States v. Cuthbertson* with reference to unpublished materials:

> The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege. Therefore, we hold that the privilege extends to unpublished materials in the possession of CBS.

Cuthbertson, 630 F.2d 139, 147 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

Similarly, the Ninth Circuit in *Shoen v. Shoen*, which also addressed a subpoena to a book author as here, held that news organizations should be free from:

> the threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool

> of government or of a private party; the disincentive to compile and preserve nonbroadcast material; and the burden on journalists's time and resources in responding to subpoenas.

Shoen, 5 F.3d 1289, 1294-95 (9th Cir. 1993) (quoting *United States v. The LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988)).[5] In *Shoen v. Shoen*, 3 F.3d 412, 414 (9th Cir. 1995), (*Shoen II*) the Ninth Circuit reiterated that "all but one of the federal circuits to address the issue have interpreted *Branzburg* . . . as establishing a qualified privilege for journalists against compelled disclosure of information gathered in the course of their work." The Court went on to set out a balancing test in determining whether the privilege had been overcome, following Justice Powell's opinion in *Branzburg*.

The Second and Fourth Circuits have also embraced constitutional protection in the form of a qualified journalist privilege. The Fourth Circuit in *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000) recently held that a sealing order was invalid because the assertion of a journalists's privilege, and subsequent finding of civil contempt, were not based on a showing that a three-part test established to overcome the privilege had been satisfied. *See id.* at 287-88 (citing *Miller*, 621 F.2d at 726). In reaching this holding, the Fourth Circuit made clear that the journalist's privilege is grounded in the First

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[5]The *Shoen* Court further concluded, in holding that a reporter's newsgathering activities were entitled to protection regardless of whether there had been a promise of confidentiality, that the "body of circuit case law and scholarly authority [is] so persuasive that we think it unnecessary to discuss the question further." *Shoen*, 5 F.3d at 1295. "[W]hen facts acquired by a journalist in the course of gathering the news become the target of discovery, a qualified privilege against compelled disclosure comes into play." *Id.* at 1292.

Amendment as "recognized by the Supreme Court in *Pell* [*Pell v. Procunier*, 417 U.S. 817, 834 (1974)] and *Branzburg*." *Id.* at 287.

In *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2nd Cir.), *cert. denied*, 481 U.S. 1015 (1987), the Second Circuit stated that "the process of newsgathering is a protected right under the First Amendment, albeit a qualified one." The Court noted that this privilege was recognized in *Branzburg*, which only rejected an absolute privilege afforded a journalist, not a qualified privilege. *Id.* The *von Bulow* decision also establishes that a book author, who has "obtained the information [sought] in the course of gathering news for publication," satisfies the definition of "journalist" for purposes of invoking the privilege. *Id.* at 143-44; *see also id.* at 144 (test looks to the "intent to use material – sought, gathered, or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process").

Nine circuits have now interpreted *Branzburg* as establishing that a qualified privilege exists under the First Amendment for at least some unpublished information.[6] Eight federal circuits have held that the qualified privilege applies to journalists faced with a subpoena seeking

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[6] *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2nd Cir. 1982); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

discovery of confidential sources.[7] Instead of a blanket rejection of the qualified privilege in grand jury proceedings as adopted by the Fifth Circuit below, this Court should acknowledge the vital public interests at stake and require that lower courts balance the competing interests accordingly, as Justice Powell urged and as adopted by the majority of circuits, whether an explicit privilege is recognized or not.

II.

THE FIFTH CIRCUIT UNCONSTITUTIONALLY ABROGATED THE QUALIFIED PRIVILEGE IN CRIMINAL AND GRAND JURY PROCEEDINGS

The Fifth Circuit has followed the majority of jurisdictions in recognizing First Amendment protection, in the form of a qualified privilege or otherwise, against compulsory disclosure of confidential sources in civil proceedings. *See, e.g., In re Selcraig,* 705 F.2d 789 (5th Cir. 1983); *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583 (1st Cir. 1980); *United States v. Caporale,* 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied,* 482 U.S. 917 (1987). As the Fifth Circuit stated in *In re Selcraig*: "We have recognized that the First Amendment shields a reporter from being required to disclose

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[7] *See Clyburn v. New World Communications, Inc.,* 903 F.2d 29 (D.C. Cir. 1990); *United States v. LaRouche Campaign,* 841 F.2d 1176 (1st Cir. 1988); *LaRouche v. National Broadcasting Co.,* 780 F.2d 1134 (4th Cir. 1986), *cert. denied,* 479 U.S. 818 (1986); *United States v. Burke,* 700 F.2d 70 (2nd Cir. 1983), *cert. denied,* 464 U.S. 816 (1983); *United States v. Cuthbertson,* 630 F.2d 139 (3d Cir. 1980), *cert. denied,* 449 U.S. 1126 (1981); *Miller v. Trans-American Press, Inc.,* 621 F.2d 721 (5th Cir.), *modified on rehearing,* 628 F.2d 932 (1980), *cert. denied,* 450 U.S. 1041 (1981); See *Shoen v. Shoen,* 5 F.3d at 1292 (9th Cir. 1993); *Silkwood v. Kerr-McGee Corp.,* 563 F.2d 433 (10th Cir. 1977).

the identity of persons who have imparted information to him in confidence." *In re Selcraig*, 705 F.2d at 792 (citing *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir.), *modified on rehearing*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)). The Fifth Circuit went on to state that "[o]ur course was dictated by our careful reading of the plurality and concurring opinions in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)." *Id.*

However, the Fifth Circuit has all but abandoned this constitutional protection in criminal proceedings. In 1998, the Fifth Circuit decided *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998), holding that there is no protection or privilege under the First Amendment to refuse to disclose nonconfidential information in response to a subpoena in a criminal proceeding. *Id.* at 972. Technically, the *Smith* decision did not reject the qualified privilege with respect to confidential sources and material since *Smith* only involved "on the record," nonconfidential sources. *Id.* at 971-72 (noting that both "*Miller* and *Selcraig* recognized privileges meant to protect newsreporters from unnecessarily revealing the identities of confidential sources."). Nevertheless, *Smith* laid the groundwork for the Fifth Circuit to abrogate the qualified privilege in grand jury proceedings in the case below.

The Fifth Circuit in this appeal made two noteworthy errors in holding that no constitutional protection applies to journalists faced with a grand jury subpoena. First, the court stated that "no circuit court has recognized a qualified testimonial privilege in the context of a criminal grand jury." (Slip op., at p. 8). However, the Third Circuit affirmed the decision in *In re Williams* that a quali-

fied First Amendment reporter's privilege prohibited compelled disclosure of confidential sources in the context of a grand jury.[8] Second, relying solely on *Smith*, the Fifth Circuit below held that the journalists's privilege is "ineffectual against a grand jury subpoena absent evidence of governmental harassment or oppression." (Slip op., at p. 6). The Fifth Circuit's interpretation of *Branzburg* essentially denies any First Amendment protection whatsoever in the criminal and grand jury context, since all that is left is the "harassment" standard codified for the protection of all witnesses by Fed. R. Crim. P. 17(c). The Fifth Circuit failed to properly analyze the purpose of the privilege, which is not to serve as a personal testimonial privilege benefiting a special class of witness, but to protect the public's "right to know" under the First Amendment. While journalists are necessarily the individuals who must assert the privilege, the protection against compusory disclosure accrues to the benefit of the confidential source, and more generally to the public as a whole. By misconceiving the purpose of the privilege, the Fifth Circuit was left with the easier decision of rejecting a personal testimonial privilege, which was not the issue presented. Thus, the Fifth Circuit perpetuated the error made in *Smith* of viewing the privilege or balancing test as benefiting journalists as a class of witness instead of the public's right to know under the First Amendment.

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[8] *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc) (quashing grand jury subpoena seeking confidential information); *see also In re Grand Jury* 95-1, 59 F.Supp.2d 1 (D.D.C. 1996) (implicitly recognizing First Amendment protection in grand jury context for confidential information, but explicitly rejecting a reporter's privilege for nonconfidential information).

A disturbing distinction drawn by the Fifth Circuit and other circuits is the availability of the privilege in civil but not criminal proceedings, where the balancing of interests "is entirely inapplicable." (Slip op., at pp. 7-8). Yet, no other testimonial privilege depends for its existence on the nature of the case in which the testimony is deemed relevant. Indeed, it makes little sense to condition the availability of a testimonial privilege on the type of case in which a subpoena is issued – journalists, and more importantly their potential sources, are left uncertain as to whether any protection will ultimately be afforded. The more logical approach is to apply the balancing test, even if more weight is accorded either the governmental interest or the defendant's fair trial rights, not to abandon the balancing test altogether.

Justice Powell's concurrence in *Branzburg* supports a case-by-case approach that balances the interests regardless of the forum in which the privilege is asserted:

> The asserted claim of privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

Branzburg, 408 U.S. at 710 (Powell, J., concurring). It is important to note that Justice Powell in *Branzburg* advocated a case-by-case balancing test in the context of grand jury proceedings as presented here, not just criminal or civil proceedings. Justice Powell was correct not to distinguish between forums because there is no legitimate rationale for distinguishing between criminal, grand jury, and civil proceedings for purposes of applying con-

stitutional protections. This Court should grant certiorari in this case to clarify the application of the qualified privilege or balancing test in all forums and proceedings in which the press is subpoenaed to produce confidential information or identify confidential sources.

III.
STRONG PUBLIC POLICY RATIONALES SUPPORT RECOGNITION OF A QUALIFIED JOURNALIST PRIVILEGE WITH RESPECT TO CONFIDENIAL SOURCES AND INFORMATION

The public policy supporting recognition of constitutional protection against compelled disclosure of confidential information and sources is significant. An independent press provides information the public needs to make important decisions about the functioning of public and private institutions. In response to this need, broadcasters and publishers produce scores of news stories each day. By their very nature, the events that are of interest to the public and therefore newsworthy – actions of government officials, crime, fires, accidents, and natural disasters – often result in civil and criminal litigation. The job of the press makes it particularly vulnerable to subpoenas issued by the government to gather information, which adversely affects the free flow of information to the public.

With respect to confidential sources, otherwise publicly unavailable information is often conveyed to journalists under a promise of confidentiality. If no qualified privilege exists to protect this promise of confidentiality, important information that should be made public will stay buried. If a reporter reveals a confidential source, he may be liable in damages to the source for breaking his

promise of confidentiality.[9] If a source knows that his identity will not be protected, there is no incentive to provide the information, thus cutting off the flow of information to the public. This self-evident fact underscores how the Fifth Circuit, relying on *Smith*, erred by misperceiving the basis for the privilege as somehow protecting a special class of witness.

In light of these essential and unique functions of the press, which distinguish the press from other private citizens, failure to recognize a journalist's privilege applicable to confidential information will have profound consequences. Abrogation of the privilege would result in severe adverse results contrary to the public interest: (1) the free flow of information to the public will be hampered as confidential informants come to understand that their identity and information will not be protected; (2) the public will begin to think of journalists as investigators for the government and private litigants, as opposed to independent newsgatherers serving the public interest; (3) the press will be burdened by an overwhelming number of requests for assistance by litigators in civil and criminal cases; and (4) journalists will curtain their research if they are required to serve as evidence collectors in addition to their traditional role as people who gather and disseminate news and information.

The nature of the proceeding in which the subpoena is issued should not be determinative of the existence of constitutional protection. The very same constitutional and public policy concerns regarding a free press are

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[9] *See Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding a reporter liable for breaking promise of confidentiality to a source).

present in the context of criminal proceedings, including grand juries, as in civil litigation. Even assuming that the interests of the government or criminal defendant may be heightened in criminal or grand jury proceedings, it is not a difference in kind but a matter of degree. The public interest in a free press, and the constitutional dimensions of press activity, remain unchanged.[10]

The constitutional considerations at issue are weighty, and the public policy rationales for recognizing a journalist's qualified privilege are significant and real. This Court should take this opportunity to confirm the existence of the qualified journalist privilege to prevent the compelled disclosure of confidential source information and material in response to a grand jury's subpoena absent the application of a balancing test on a case-by-case basis. This Court should reiterate the three-prong test set forth in Justice Powell's concurring opinion in *Branzburg*, refined and utilized by many lower federal circuit courts, to determine if the government has met its burden to pierce the qualified privilege. The government must show that the information sought is (1) highly

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[10]The U.S. Justice Department recognizes that newsgathering is essential to preserving a free press, as evidenced by its internal policy and procedures for issuing subpoenas to the press implemented by the Nixon Administration's Justice Department in 1973. *See* 28 C.F.R. 50.10 (2000) (Attorney General's "Policy with regard to the issuance of subpoenas to or filing of criminal charges against members of the news media"). The Justice Department requires that a U.S. Attorney obtain authorization from the Attorney General before serving subpoenas on members of the press. *Id.* § 50.10; *see also id.* § 50.10(f)(2), (f)(3) (requiring that federal authorities demonstrate that any information sought – not just confidential source information – is "essential to the successful completion of the litigation in a case of substantial importance," and cannot be obtained from "alternative nonmedia sources").

material and relevant; (2) necessary or critical to the maintenance of the claim or defense; and (3) not obtainable from other sources. *See Branzburg*, 408 U.S. at 725; *Miller*, 621 F.2d at 726; *see also United States v. Burke*, 700 F.2d 70, 77 (2nd Cir.), *cert. denied*, 464 U.S. 816 (1983). The party seeking disclosure of a confidential informant's identity bears the burden of proving by substantial evidence that these three requirements have been met. *Miller*, 621 F.2d at 726. When the government has not made this showing, courts should be more willing to accept the argument that the government is either using its subpoena powers to harass the press, a danger recognized by this Court in *Branzburg*, 408 U.S. 710, or simply abrogating its own duty to investigate criminal activity.

The mission of the press to inform the public will certainly suffer without the protection offered by the qualified privilege, a result that Justice Powell cautioned against in his concurrence in *Branzburg*: "[w]e do not hold . . . that state and federal authorities are free to 'annex' the news media as an 'investigative arm of the government.' " *Branzburg*, 408 U.S. at 709 (Powell, J. concurring). The resulting harm is to the public, for whom a free press is designed to benefit. This Court is presented with an opportunity to minimize the harm inflicted on the public by recognizing the journalist's qualified privilege and clearly articulating its scope under the First Amendment.

CONCLUSION

Allowing unrestrained subpoenas for a journalist's work product in criminal and grand jury proceedings will seriously affect the vitality of the press. Reasonable journalists will fear that the use of similar sub-

poenas will allow prosecutors to use journalists as private investigators, thereby restricting the free flow of information to the public. Therefore, *amici curiae* urge this Court to explicitly recognize that the qualified journalist's privilege protects Petitioner Leggett's confidential sources and information, and that a balancing test should apply to determine whether compelled disclosure is appropriate.

Whether conceived as an explicit privilege or as a balancing test to further constitutional protections, the government must demonstrate that the specific, known information sought is highly relevant to the case, not merely duplicative or cumulative, and all reasonable alternate sources of the information have been exhausted. Otherwise, the presumption should be that the government is infringing on the protections afforded the press, and the public, under the First Amendment.

Respectfully submitted,

CHARLES L. BABCOCK
ROBERT P. LATHAM
JOHN K. EDWARDS
JACKSON WALKER LLP
1100 Louisiana Street
Suite 4200
Houston, Texas 77002
(713) 752-4200
Telecopier:
(713) 752-4221
Counsel for Amici Curiae.

Supreme Court, U.S.
FILED
MAR 11 2002
CLERK

No. 01-983

In the Supreme Court of the United States

VANESSA LEGGETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

DEMETRA LAMBROS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether an order holding petitioner in contempt and incarcerating her for refusing to testify before a federal grand jury violated her First or Fifth Amendment rights or presents a live controversy now that petitioner has been released from custody.

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In the Supreme Court of the United States

No. 01-983

VANESSA LEGGETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2001. A petition for rehearing was denied on November 13, 2001 (Pet. App. 13). The petition for a writ of certiorari was filed on December 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In late 2000, a federal grand jury sitting in the Southern District of Texas convened an investigation into possible illegal activities of wealthy Houstonian

Robert Angleton. Among other things, Angleton was suspected of hiring his brother, Roger, to kill his wife, Doris. Pet. App. 2. Roger Angleton, the alleged triggerman, committed suicide while in custody at the Harris County jail. *Ibid.*

Petitioner is an English teacher and "aspiring freelance writer" who intends to write a book about the murder. Pet. App. 2.[1] She has conducted her own investigation of the crime, which has included interviews with both Angleton brothers, Roger's wife, and numerous other people connected to the case. The interviews were recorded on tapes and in written notes. *Ibid.*

On December 7, 2000, petitioner was subpoenaed to appear before the grand jury investigating Robert Angleton. She was assured that she was neither a target nor a subject of the proceedings. She testified before the grand jury without protest, and she did not object to providing the grand jury with her notes, tapes, and photographs. Pet. App. 2-3.

On June 18, 2001, the grand jury issued a subpoena to petitioner, directing her to appear and to bring:

> Any and all tape recorded conversations, originals and copies, of conversations you had with any of the following individuals [identifying 34 people by name], or any other recorded conversations with individuals associated with the prosecution of ROBERT ANGLETON, either with or without their consent, and all transcripts prepared from those tape recordings.

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[1] In her career, petitioner has published one article in an FBI publication ("Varieties of Homicide") and one fictional short story. Pet. App. 2 n.3. The court of appeals characterized her as a "virtually unpublished freelance writer operating without an employer or a contract for publication." *Id.* at 5.

Pet. App. 3. This time, petitioner moved to quash the subpoena, invoking the so-called "journalist's privilege" under the First Amendment. The district court denied the motion, and while her motion to reconsider was pending, she was served on July 18 with a new but virtually identical grand jury subpoena compelling her to appear the next day. *Ibid.*

Petitioner appeared before the grand jury on July 19, but refused to produce the tape recordings and notes, claiming privileges under the First and Fifth Amendments. As to the latter, defense counsel expressed concern that because petitioner recorded certain conversations without the consent of the interviewees, she might be subject to prosecution in certain States. See 7/6/01 Hearing 34; 7/19/01 Hearing 19-20. The government offered petitioner a "proffer letter," granting her use and derivative use immunity for her grand jury testimony, as well as for any statements made to federal agents. Petitioner refused the offer. Pet. App. 3-4.

In a hearing that same day, the district court held petitioner in contempt pursuant to 28 U.S.C. 1826(a) and ordered her jailed. Pet. App. 4.[2]

2. After expedited briefing, the court of appeals affirmed. It noted, first, that while a "qualified privi-

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[2] Section 1826(a) provides, in pertinent part:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information * * * the court, upon such refusal * * * may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of * * * the term of the grand jury, including extensions.

lege protects journalists from divulging confidential sources under limited circumstances," the privilege is weaker in criminal cases than in civil cases, and "reach[es] its nadir in grand jury proceedings." Pet. App. 5. The court held that, even if petitioner could be considered a "journalist" for purposes of the privilege, "the journalist's privilege is ineffectual against a grand jury subpoena absent evidence of governmental harassment or oppression." *Id.* at 5-6 (citing *Branzburg* v. *Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring); *United States* v. *Smith*, 135 F.3d 963, 971 (5th Cir. 1998)). The court further concluded that "[o]nly when the grand jury investigation is not being conducted in good faith is the journalists' privilege valid." *Id.* at 6 (internal quotation marks omitted).

Applying that standard, the court found that petitioner had failed to show that the grand jury investigation was not proceeding in good faith, or that she was harassed or oppressed by the proceedings:

> While perhaps not as narrowly tailored as would be ideal, the subpoena directing [petitioner] to produce her tape recordings and interview notes is not so overly broad as to be oppressive. Indeed, the subpoena clearly seeks material that is closely related to the subject of the grand jury investigation.

Pet. App. 6.

The court found petitioner's attempt to invoke her Fifth Amendment privilege against self-incrimination "equally unavailing":

> She has been repeatedly advised that she is neither a target nor a subject of the grand jury investigation. She has made no meaningful argument that the disclosure of her tape recordings and interview notes could be used against her in some future

> criminal prosecution. [Her] vague and speculative effort to invoke the Fifth Amendment is further undermined by the government's proffer of a written non-prosecution agreement.

Pet. App. 8. Because petitioner did not show "'reasonable cause to apprehend danger from a direct answer,' and because her answers would not 'furnish a link in the chain of evidence needed for a prosecution,'" the court found that she could not invoke the privilege against self-incrimination. *Ibid.*

3. On January 4, 2002, the grand jury's term expired. That day, petitioner was released from prison. On January 24, 2002, Robert Angleton was indicted on federal murder charges.

ARGUMENT

Petitioner renews her claim (Pet. 7-26) that she had a First Amendment privilege to refuse to answer the grand jury's questions. She also contends that, in refusing to testify, she validly invoked her Fifth Amendment privilege against self-incrimination. Pet. 26-30. Because petitioner has been released from custody, however, this case is moot. In any event, her claims do not warrant further review.

1. "Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)). In other words, a litigant must continue to "suffer[], or be threatened with, an actual injury * * * likely to be redressed by a

favorable judicial decision." *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990)).

Petitioner seeks relief from the district court's order incarcerating her for refusing to testify before the grand jury. Under 28 U.S.C. 1826, petitioner's term of confinement was commensurate with the life of the grand jury. When the grand jury was terminated on January 4, petitioner was released from prison. She is thus no longer aggrieved by the district court's order, and the case is moot. See *Weinstein* v. *Bradford*, 423 U.S. 147, 148 (1975) (per curiam) (prisoner's challenge to parole board procedures mooted by his release from supervision); see also *In re Grand Jury Proceedings*, 863 F.2d 667, 668-669 (9th Cir. 1988) (case moot where contempt order for refusing to testify before grand jury expired with termination of grand jury); *In re Grand Jury Proceedings*, 785 F.2d 629, 630-631 (8th Cir. 1986) (same).

This is not a case that presents an issue "capable of repetition, yet evading review." *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). That exception to the mootness doctrine applies only where "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein*, 423 U.S. at 149. Here, the grand jury completed its investigation, indicted Robert Angleton, and was terminated. The government has no intention (or reason) to reconvene the grand jury in connection with the case. Petitioner, thus, has no reasonable expectation that she will again be incarcerated for failure to answer the grand jury's questions.

2. Even if petitioner's First Amendment claim were not moot, it would be foreclosed by this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). In *Branz-*

burg, the Court held that journalists, like other citizens, must "respond to relevant questions put to them in the course of a valid grand jury investigation." *Id.* at 690-691; see *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("[T]he First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source."); *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 201 (1990) (*Branzburg* "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary.").

a. In *Branzburg*, the Court rejected the suggestion that courts should conduct a case-by-case balancing of interests each time a journalist is subpoenaed by a grand jury. Instead, the Court struck a one-time balance and announced a categorical rule: the state's interest in "law enforcement and in ensuring effective grand jury proceedings" justifies the "burden on First Amendment rights" when "reporters [are required] to give testimony in the manner and for the reasons that other citizens are called." 408 U.S. at 690, 700.[3]

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[3] The Court was also mindful of the practical problems posed by a case-by-case approach. See 408 U.S. at 702 n.39 (explaining that, under the "case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of 'importance' or 'relevance' in relation to the free press interest"); *id.* at 705 ("In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been

The Court acknowledged that "news gathering is not without its First Amendment protections" and noted that "grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." 408 U.S. at 707. The Court stated that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *Id.* at 707-708. Justice Powell underscored that point in a separate concurrence, in which he noted his view that news gatherers would be entitled to First Amendment protection where a grand jury's investigation "is not being conducted in good faith"—such as where the information sought "bear[s] only a remote and tenuous relationship to the subject of the investigation," or where there is "some other reason to believe that [the] testimony implicates confidential source relationships without a legitimate need of law enforcement." *Id.* at 710 (Powell, J., concurring). Justice Powell, however, joined the opinion of the Court, and his separate concurrence accordingly cannot be read to alter the holding of the case that, at least absent bad faith or an intent to harass, there is no

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laid for the reporter's appearance: * * * Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege? Thus, in the end, by considering whether enforcement of a particular law served a 'compelling' governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws.").

journalist's privilege to refuse to comply with a grand jury subpoena.[4]

Petitioner does not claim that the government conducted the grand jury investigation in bad faith or that the grand jury's subpoena was meant to harass her.[5] Instead, she contends (Pet. 8) that *Branzburg* mandates a "case-by-case balancing test" every time a journalist is subpoenaed to appear before the grand jury. That contention is mistaken. As explained above, the Court explicitly rejected such a case-by-case approach, opting instead for a bright line rule: journalists must answer to the grand jury just like other citizens. See *Branzburg*, 408 U.S. at 708 ("If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investi-

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[4] See *In re Grand Jury Proceedings*, 5 F.3d 397, 401 (9th Cir. 1993) (Justice Powell's concurrence in *Branzburg* must be read to comport with majority opinion that he joined; "[t]he balancing of interests suggested by Justice Powell is in the limited circumstances he mentioned, where there is in effect, an abuse of the grand jury function."), cert. denied, 510 U.S. 1041 (1994); accord *Smith*, 135 F.3d at 968-969; *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992) ("[A]bsent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution."); *In re Grand Jury Proceedings*, 810 F.2d 580, 585 (6th Cir. 1987) ("Justice Powell's concurring opinion * * * neither limits nor expands upon [the majority's] holding."); *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 571 (D.C. Cir. 1977) ("A newsman can claim no general immunity, qualified or otherwise, from grand jury questioning. On the contrary, like all other witnesses, he must appear and normally must answer. If the grand jury's questions are put in bad faith for the purpose of harassment, he can call on the courts for protection.").

[5] The district court found that the government did not harass petitioner. See 7/09/01 Sealed Order 3 (Record Excerpts No. 3); 7/19/01 Hearing 46-47.

gation, then * * * there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some 'compelling need' for a newsman's testimony."); *Smith*, 135 F.3d at 968 (*Branzburg* "instructed that the needs of the press are not to be weighed against the needs of the government in considering grand jury subpoenas."); *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) (*Branzburg* conducted a "one-time-only balancing of the conflicting interests."), cert. denied, 510 U.S. 1041 (1994).

b. Petitioner errs in contending (Pet. 12-21) that the decision below conflicts with cases from other courts of appeals requiring some form of case-specific balancing when a journalist is called upon to divulge information. Each of the cases cited by petitioner as requiring such case-specific balancing concerns a trial subpoena, not a grand jury subpoena such as those in this case and in *Branzburg*. For example, although petitioner cites (Pet. 14) the First Circuit's decision in *United States* v. *LaRouche Campaign*, 841 F.2d 1176, 1182 (1988), that case concerned a defendant's trial subpoena to a television network, and the court ultimately affirmed the district court's refusal to quash the subpoena on First Amendment grounds. Petitioner also cites (Pet. 14) *United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir.), cert. denied, 464 U.S. 816 (1983), but that case too involved a defendant's trial subpoena to a journalist, not a grand jury subpoena. Moreover, even as applied to trial subpoenas, the Second Circuit has since explained that "*Burke*'s articulation of a general test applicable to all phases of a criminal trial was not necessary to the resolution of that case" and concluded that "*Burke* should accordingly be considered as limited to its facts." *United States* v. *Cutler*, 6 F.3d 67, 73 (2d Cir. 1993). The Third Circuit in *United States* v. *Cuthbertson*, 630

F.2d 139, 146-147 (1980), cert. denied, 449 U.S. 1126 (1981), similarly addressed a trial subpoena by the government to a television network; the only Third Circuit decision to address the question of a journalist's privilege in the grand jury context resulted in an affirmance by an equally divided en banc court, and it therefore has no precedential effect. See *In re Williams*, 963 F.2d 567 (3d Cir. 1992).

To extend the reasoning of the trial subpoena cases to the grand jury context, as petitioner urges, would conflict with the holding in *Branzburg*. See 408 U.S. at 682 ("The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."). Indeed, in refusing to recognize a reporter's privilege, the *Branzburg* Court repeatedly underscored the historically unique and important role of the grand jury. See, *e.g.*, 408 U.S. at 685 (noting that "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury"); *id.* at 688 (noting that "the grand jury's authority to subpoena witnesses is not only historic, but essential to its task" and that "the longstanding principle that 'the public . . . has a right to every man's evidence,' * * * is particularly applicable to grand jury proceedings") (citations omitted); *id.* at 701 ("A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.") (internal quotation marks omitted).

As the court below noted, no court of appeals has recognized a qualified testimonial privilege in the context of a criminal grand jury. Pet. App. 7. There is

thus no conflict between this case and any decision of any other court of appeals, and further review is not warranted.[6]

3. Petitioner also claims (Pet. 26-30) that the court of appeals erred in finding that she did not have a basis for invoking her Fifth Amendment privilege against compelled self-incrimination. Even if that claim were not moot, it would not warrant this Court's review.

A witness may invoke the privilege against self-incrimination only when there is reasonable cause to believe that a direct answer would support a conviction or provide a link in the chain of evidence leading to a conviction. *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951). To be self-incriminating, the compelled answers must pose a "substantial and 'real,' and not merely [a] trifling or imaginary, hazard[]" of criminal prosecution. *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); see *Ohio* v. *Reiner*, 532 U.S. 17, 20-21 (2001) (per curiam). The court of appeals found that petitioner made only a "vague and speculative" argument that compliance with the grand jury subpoena could incriminate her. Pet. App. 8; see *ibid.* (noting that petitioner "has made no meaningful argument that the disclosure of her tape recordings and interview notes

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[6] Petitioner separately contends that the grand jury subpoena amounted to an unlawful "prior restraint" on the publication of her book. Pet. 22-24. Because that issue was neither presented to, nor decided by, the court of appeals, it is not properly before this Court. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). Furthermore, the Court in *Branzburg* specifically noted that requring journalists to comply with grand jury subpoenas does not amount to a "prior restraint or restriction on what the press may publish." 408 U.S. at 681.

could be used against her in some future criminal prosecution"). That factbound determination does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 226 (1925). Furthermore, as the court also noted (Pet. App. 8), the government provided petitioner with a written non-prosecution agreement that bound the government to the full extent of 18 U.S.C. 6001 (1994 & Supp. V 1999).[7] It also represented that it would seek immunity from any state prosecution, if necessary. See 7/19/01 Hearing 35-36. The court of appeals correctly found that petitioner's refusal to testify was not justified under the Fifth Amendment.

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[7] The letter provided:

> Any information you provide in response to questions posed by law enforcement agents or a subsequent grand jury shall receive protections co-extensive with and limited by those conferred for testimony given pursuant to a compulsion order issued under the provisions of 18 U.S.C. § 6001 et seq. That is, such information shall not be used directly or indirectly against you in any criminal case, except that such information may be used against you in any prosecution for perjury, giving a false statement to a federal official in a matter within that official's jurisdiction, and/or obstruction of justice.

7/19/01 Letter (Record Excerpts No. 7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

DEMETRA LAMBROS
Attorney

MARCH 2002

Supreme Court U.S.
FILED
MAR 25 2002
OFFICE OF THE CLERK

(5)

No. 01-983

In The

Supreme Court of the United States

VANESSA LEGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BY PETITIONER TO GOVERNMENT'S BRIEF IN OPPOSITION

George Michael DeGeurin
Foreman, DeGeurin, Nugent & Gerger
300 Main Street
Houston, Texas 77002
(713) 655-9000 Telephone
(713) 655-1812 Facsimile

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19pp

QUESTION PRESENTED

Whether petitioner's First and Fifth Amendment challenges to a contempt order, incarcerating her for refusing to testify and provide evidence before a federal grand jury, are moot once petitioner has been released from custody but remains under real threat of being re-subpoenaed for the same evidence at trial.

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ARGUMENT

On January 4, 2002, Vanessa Leggett, a freelance journalist and author,[1] was released from the Federal Detention Center in Houston, TX. She had been incarcerated for 168 days.[2]

Ms. Leggett's confinement was terminated upon motion of her counsel and was in conjunction with the expiration of the 18 month term of the federal grand jury investigating Robert Angleton. The government responded to Ms. Leggett's request for release by declaring that:

> The United States intends to renew its request of LEGGETT to provide the previously requested material and will pursue available procedures to require LEGGETT's cooperation, if necessary. *See* January 3, 2002, United States' Response to Motion to Vacate Contempt Order and for Order of Immediate Release (Lodged with the Clerk of the United States Supreme Court).

The prosecutors' resolve to appropriate, through subpoena, Ms. Leggett's journalistic research (including her confidential sources and conversations) and her anticipated assertion of privilege, makes a second

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[1] The government inaccurately states in its brief that Ms. Leggett has only been published two times in her career as a freelance writer. Ms. Leggett has been published four times including *Newsweek, Suddenly* (a short story anthology) and now in two separate publications by the Federal Bureau of Investigations/Department of Justice in "The Diversity of Homicide" and "The Varieties of Homicide".

[2] Prior to Ms. Leggett, the longest known incarceration of a U.S. journalist was 46 days.

contempt hearing appear inevitable. There remains an "actual, ongoing controversy." Therefore, despite the termination of the underlying contempt order, this case remains ripe for federal-court adjudication under Article III of the U.S. Constitution. *See* U.S. CONST. art. III; *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988).

Soon after Ms. Leggett was released from jail, the government convened a new grand jury and immediately indicted Mr. Angleton. He is currently scheduled to begin trial on June 3, 2002. The prosecution notified counsel for Ms. Leggett that she is on the government's witness list for trial and will be resubpoenaed. *See* March 20, 2002, Affidavit of Attorney George Michael DeGeurin (Lodged with the Clerk of the U.S. Supreme Court). Ms. Leggett faces a substantial threat of future incarceration based on the Fifth Circuit's analysis of both her First and Fifth Amendment privileges.

Ms. Leggett's situation merits review as it is "likely to be redressed by a favorable judicial decision" by this Court in the instant case. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). Although Ms. Leggett's original order of contempt was based on a grand jury subpoena, the Fifth Circuit's analysis of a journalist's First Amendment privilege does not differentiate between grand jury and criminal trial subpoenas. *See United States v. Smith*, 135 F.3d 963 (5th Cir. 1998); *In re Grand Jury Subpoenas (Leggett)*, Slip. opin. 01-20745 (Nov. 13, 2001). The same holds true for her Fifth Amendment privilege. Ms. Leggett remains subject to the same action

occurring again and yet, due to the nature of the contempt statute, her case is "capable of repetition but evading review." *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

This case fits the exception to the rule against mootness which applies when two elements co-exist. First, the challenged action must be of inherently short duration, a period too brief for effective judicial review; second, the party raising the challenge must have a reasonable expectation that she will again be subjected to the same type of action. *Weinstein*, 423 U.S. at 149. Both prongs are satisfied here. First, it is well recognized that a contempt action is intrinsically limited in term, lasting no longer than 18 months. *See* 18 U.S.C. § 1826. This Court has previously held that 18 months was not enough time for complete judicial review and certainly, the five months afforded Ms. Leggett, before the termination of the grand jury, was not sufficient to consummate such a task. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978).

Secondly, the Fifth Circuit's admittedly "narrow view of the journalist's privilege in criminal cases" provides a reasonable basis to believe Ms. Leggett will be subjected to a second contempt action after the government re-subpoenas her either to the new grand jury or as a witness at Mr. Angleton's trial. *Leggett*, p. 6. Unlike other courts, the Fifth Circuit has limited its application of a journalist's qualified First Amendment privilege to only protection against harassment or oppression – both before the grand jury

and the criminal trial court. *Smith,* 135 F.3d at 971[3]; *Leggett,* Slip. opin. 01-20745, p. 7. The same test will assuredly result in an identical outcome for Ms. Leggett in future contempt actions, unless she can successfully avail herself of full appellate review.

Yet, the government urges the Court to find Ms. Leggett's case moot based solely on the termination of the original grand jury. They rely on three cases in support of that position and each will be addressed in turn below. First, in *Weinstein v. Bradford, supra,* a challenge to parole procedures was held to be moot where the plaintiff had completed his sentence and there was no longer any likelihood whatsoever that he would again be subjected to the challenged parole procedures. *Weinstein* can be distinguished on its facts from Ms. Leggett's case because here the government has already indicated that they will be resubpoenaing Ms. Leggett for the same evidence in their continuing prosecution of Robert Angleton. Distinguishable on the same grounds is *In re Grand Jury Proceedings (Larson),* 785 F.2d 629 (8th Cir. 1986), where the court held a civil contemnor's appeal as moot after the grand jury's investigation resulted in both an indictment and a guilty plea causing the witness to no longer have any reasonable expectation that he would be resubpoenaed to testify in the matter.

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[3] Although *Smith* dealt with the application of a journalist's First Amendment privilege against the disclosure of nonconfidential materials before a criminal trial court, the court went on to state that although it was not directly before the court, a similar claim based on confidential materials had already been rejected in *Branzburg v. Hayes,* 408 U.S. 665 (1972). 135 F.3d at 969.

Finally, in *In re Grand Jury Proceedings (Doe)*, 863 F.2d 667 (9th Cir. 1988), the court held a contemnor's appeal to be moot upon termination of the grand jury, where the witness was found to have access to an expedited review by that same court if he faced a second grand jury subpoena/contempt action in the future. The *Doe* decision is not controlling in this case because the circuit court did not address the issue in question here – whether a resubpoenaed petitioner would also receive timely judicial review by the U.S. Supreme Court where an expedited appeal is not available.

The *Doe* case also is in conflict with the Fourth Circuit's opinion in *In re Grand Jury Proceedings Thursday Special Grand Jury September Term*, 22 F.3d 342 (4th Cir. 1994), where an appeal from an order enforcing a grand jury's subpoenas was not found moot upon termination of the grand jury. In that case the court found:

> There is more than a reasonable expectation that the complaining party . . . will be subjected to the same action again. Additionally, as is apparent from the present proceedings, the life of a subpoena, measured by the duration of a grand jury session, is too short to be fully litigated prior to its expiration. Id. at 346-347.

Here, the government has not met the heavy burden that lies with the party asserting mootness requiring it to show that the challenged conduct cannot be expected to re-occur. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). Similarly, they have made no showing that this case will not escape full appellate review.

The government's mootness argument is unpersuasive and is additionally suspect due to its control over the grand jury itself. Specifically, it is the prosecutor who determines the date and order that witnesses will be subpoenaed. Following the government's theory, a prosecutor could thwart a contemnor's ability to reach judicial reveiw by the U.S. Supreme Court simply by subpoenaing the witness towards the middle or end of the grand jury term. The contemnor would inevitably "run out of time" before ever reaching full appellate review. This is what occurred here. Even though the federal government was fully aware of Ms. Leggett (and the evidence that she is alleged to possess) at the inception of the grand jury,[4] they chose not to subpoena her until its near termination. Despite her submission of an expedited appeal to the Fifth Circuit, Ms. Leggett's six month incarceration was insufficient time for her to seek full review by this Court before the grand jury terminated. Her situation only demonstrates how the government's theory on mootness would arguably allow them to dictate whether or not Ms. Leggett's case and others ever receive full appellate review.

Ms. Leggett would have similarly little control over the time afforded her for judicial review if she were subpoenaed and held in contempt before the trial court. This Court has also recognized that due to the short duration of criminal trials, there remains the possibility that trial specific orders will evade review, or at least

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[4] This is due to the state prosecution of Robert Angleton on similar charges and the sharing of information between the state and the federal government in their investigations.

plenary review, of the Supreme Court. *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (Challenge by media to a court order that excluded public from a trial was not mooted by acquittal of defendant due to the short term nature of criminal trials). If Ms. Leggett's instant appeal were found moot under the government's theory, she could potentially return to custody before and during the criminal trial while trying to obtain full appellate review – only to have her case mooted again due to the conclusion of the trial.

Ms. Leggett's case is clearly one that fits the "capable of repetition but evading review" exception to the mootness doctrine. While the government makes an unpersuasive attempt to disregard her First Amendment claims, it makes no attempt to claim mootness on her Fifth Amendment privilege.[5] Both issues deserve this court's attention and review.

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[5] Instead the government argues that Ms. Leggett's Fifth Amendment claim of privilege does not warrant this Court's review. In doing so, they cite *United States v. Johnston*, 268 U.S. 220, 226 (1925), a case that is factually inapposite and where they direct the court's attention to a page where the court actually granted certiorari.

CONCLUSION

Wherefore the petitioner prays that this Court grant the petition for writ of certiorari as to this cause.

Respectfully submitted,

GEORGE MICHAEL DEGEURIN
FOREMAN, DEGEURIN NUGENT & GERGER
300 Main Street
Houston, Texas 77002
(713) 655-9000 Telephone
(713) 655-1812 Facsimile
Counsel of Record for Petitioner

No. 01-983

IN THE
SUPREME COURT OF THE UNITED STATES

VANESSA LEGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFDIAVIT

AFFIDAVIT

BEFORE ME the undersigned authority personally appeared George Michael DeGeurin who after being duly sworn deposed and said:

> My name is George Michael DeGeurin. I am the attorney of record for Vanessa Leggett. The target of the grand jury investigation when Vanessa Leggett was subpoenaed to testify before the Grand Jury was Robert Angelton. When the term of that Grand Jury expired Vanessa Leggett was released from custody. Shortly after Vanessa Leggett's release from custody a new Grand Jury indicted Mr. Robert Angelton. The assistant U.S. attorney assigned the prosecution of Mr. Robert Angleton notified me that Vanessa Leggett would be subpoenaed again, this time as a witness for the trial of Robert Angelton. I was further informed that Vanessa Leggett is included in the government's witness list for trial that will be provided to Robert Angleton's defense attorney.

/s/ George Michael DeGeurin
George Michael DeGeurin

SUBSCRIBED TO before me, the undersigned authority on this the 20th day of March, 2002.

[SEAL] BLANCA LUJAN
MY COMMISSION EXPIRES
July 24, 2002

/s/ Blanca Lujan
Notary Public for the
State of Texas

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE GRAND JURY	§	
SUBPOENA TO	§	MISCELLANEOUS
VANESSA LEGGETT	§	NO. 01-179
	§	

UNITED STATES' RESPONSE TO MOTION TO VACATE CONTEMPT ORDER AND FOR ORDER OF IMMEDIATE RELEASE

The United States of America, through Michael T. Shelby, United States Attorney for the Southern District of Texas, responds to VANESSA LEGGETT's Motion to Vacate Contempt Order and for Order of Immediate Release, as follows:

1. On July 19, 2001, VANESSA LEGGETT appeared before Federal Grand Jury 00-01 and refused to comply with a grand jury subpoena requiring her to turn over tapes of interviews she admitted that she conducted with others in the investigation of Robert Angleton. Specifically, LEGGETT refused to respond to questions relating to her creation and or possession of tape recorded conversations, both video and audio, of 34 named individuals.

2. The district court conducted a hearing and LEGGETT again refused to comply with the grand jury subpoena citing her Journalist's privilege under the First Amendment. The district court cited LEGGETT for contempt under Title 28, United States Code, Section 1826(a). The court denied her motion for rehearing. On July 20,

2001, LEGGETT surrendered to the custody of the United States Marshal.

3. On August 17, 2001, the United States Court of Appeals for the Fifth Circuit recognized that no circuit court in this country has recognized a qualified testimonial privilege in the context of a federal criminal grand jury. The Fifth Circuit affirmed the district court finding that the court did not abuse its discretion in ordering LEGGETT incarcerated for contempt. The Fifth Circuit concluded that in criminal grand jury matters the public's interest in effective law enforcement virtually always outweighs the press's privilege against disclosing confidential sources or information.

4. Subsequently, LEGGETT exhausted her right of appeal before the Fifth Circuit when her motions for bond and rehearing en banc were denied.

5. As a matter of law, Rule 6(g) Federal Rules of Criminal Procedure, Grand Jury 00-01 cannot be extended beyond January 4, 2002. Therefore, VANESSA LEGGETT must be released by the court on that date and the court need not act on LEGGETT's motion for this to occur.

6. No citizen has the right to withhold evidence from a criminal grand jury. She continues to refuse to comply with the grand jury subpoena and with the order of the district court.

7. The United States intends to renew its request of LEGGETT to provide the previously requested material and will pursue available procedures to require LEGGETT's cooperation, if necessary.

Respectfully submitted,

MICHAEL T. SHELBY
United States Attorney

TERRY CLARK
EDWARD F. GALLAGHER III
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I certify that a copy of United States' Response to Vanessa Leggett's Motion to Vacate Contempt Order and for Order of Immediate Release was sent to her counsel, Mike DeGuerin, by facsmile [sic] on January 3, 2002.

TERRY CLARK
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE GRAND JURY	§	
SUBPOENA TO	§	MISCELLANEOUS
VANESSA LEGGETT	§	NO. 01-179
	§	

ORDER

Based upon the termination of service for Grand Jury 00-01, effective January 4, 2002, this Court has no choice but to order the Federal Detention Center in Houston to release VANESSA LEGGETT on January 4, 2002, no later than _____ a.m./p.m.

Signed January ___, 2002.

MELINDA HARMON
United States District Judge